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A TREATISE

ON THE

LAW OF AGENCY

INCLUDING

SPECIAL CLASSES OF AGENTS

ATTORNEYS, BROKERS AND FACTORS, AUCTIONEERS,
MASTERS OF VESSELS, ETC., ETC.

BY

WILLIAM LAWRENCE CLARK
(Author of *Clark and Marshall on Private Corporations*)

AND

HENRY H. SKYLES

IN TWO VOLUMES

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LEGAL RIGHTS, DUTIES AND LIABILITIES ARISING OUT OF THE RELATION.

CHAPTER XVI.

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§ 523. In general.

In the preceding chapter, the duties and liabilities of a principal to a third person, arising out of transactions en-

tered into by his agent on his behalf, have been considered. Out of those transactions reciprocal duties and liabilities on the part of the third party may arise. These duties and liabilities may, in some cases, be due to the agent alone, in others to the agent and principal, and in others to the principal alone. The duties and liabilities which are due to the agent, or in respect to which he may sue, will be considered in a subsequent chapter; so that it is the object of this chapter to consider a third person's duties and liabilities to the principal. As a principal is responsible for the burdens and responsibilities arising out of transactions on his behalf by his agent, usually he is entitled to all the rights and benefits accruing from such transactions, and for that reason may maintain an action against the third person for the enforcement of these obligations. These obligations on the part of the third person may arise in various ways. They may be the direct result of contracts made by him with the agent, for the principal, or they may arise out of torts committed by him, in such a way as to affect the principal's interests; or again they may arise by reason of certain equitable remedies which a principal may have in order to follow trust funds or property entrusted to his agent. These liabilities of the third person to a principal will be considered in this order in the following sections.

I. LIABILITY ON CONTRACTS AND QUASI CONTRACTS GENERALLY.

§ 524. Liability on contracts made by an agent in the name of his principal.

If an agent, duly authorized, enters into a contract in the name of his principal, it is precisely the same as if the principal had personally entered into the contract, instead of through the intervention of the agent, and the liability of the other party to the principal is the same. The contract is entirely and solely between the principal and the third party, and the former may maintain an action against the latter thereon. This is so clear as to require the citation of but few authorities.¹ And, in such cases, the third party will not be

¹ *Fairlie v. Fenton*, L. R. 5 Exch. 169; *Sharp v. Jones*, 18 Ind.

allowed to set off, against the principal's demand, any equity he may have against the agent personally.² As will hereafter be seen, the agent is not a party to such a contract at all, and the third party cannot be sued by him.³

Of course, in order that the third party may be liable to the principal, the agent must have been authorized by the latter to make the contract, or the contract must have been ratified by him, for otherwise the contract is not binding on the principal, and if not binding on him, it cannot be binding on the third person. The authority of the agent, however, may be express or implied, actual or apparent. If an agent enters into a contract which is within the scope of his apparent authority, so that it is binding on the principal, it is also binding on the other party.

Ratification of an unauthorized contract has the same effect, with respect to the liability of the other party, as original authority. If a person enters into a contract as agent for another and in the other's name, but without authority, the other may ratify the contract, and if he does so, he will not only be liable thereon, but he may maintain an action thereon against the other party. In other words ratification of an unauthorized contract relates back to the time the contract was made, and the rights of the principal against the third party, as well as his liability, are the same as if the contract had been authorized when made, provided the third person had not receded from his contract before the ratification.⁴

§ 525. Liability on contracts for foreign principal.

There is nothing to prevent a foreign principal from entering into a contract through his resident agent, and if he does so, he is liable and is entitled to sue the third person

314, 81 Am. Dec. 359; *Waldorf v. Simpson*, 15 App. Div. (N. Y.) 297; *Rand v. Moulton*, 72 App. Div. (N. Y.) 236; *Arlington v. Hinds*, 1 D. Chp. (Vt.) 431, 12 Am. Dec. 704.

² *Dresser v. Norwood*, 17 C. B. (N. S.) 466; *Hurlbert v. Pacific Ins. Co.*, 2 Sumn. 471, Fed. Cas. No. 6,919; *Stinson v. Gould*, 74 Ill. 80; *Ladd v. Arkell*, 40 N. Y. Super. Ct. 150.

³ Post, § 617.

⁴ As to ratification, see ante, § 148.

thereon, to the same extent as a resident principal.⁵ The question in this connection is whether the intention was a contract between the principal and the third person, or a contract with the agent only; and this question will be considered in a subsequent chapter.

It has been sometimes said that when a sale is made by an agent for a foreign principal, the latter cannot sue for the price, on the ground that in such case the presumption of law is that exclusive credit was given to the agent, and therefore the principal cannot be treated in any manner whatever as a party to the contract; and that in order that a foreign principal may sue, in such cases, the agent must have authority to establish a privity of contract between the principal and the third person, and it must appear from the terms of the contract, or the surrounding circumstances, that such privity of contract was intended by the third person and the agent.⁶ But the later and better opinion is that there is no such absolute presumption, and that a principal, whether foreign or domestic, may sue to recover the price of goods sold by his agent, unless it is made affirmatively to appear that exclusive credit was given to the agent, by proof, other than the mere fact that the principal resided in another state or country.⁷ Even if it were settled that an undisclosed foreign principal could not maintain an action on a contract made by his agent with another, this rule would not apply where the parties are residents of different states of the United States, for they are not foreign to each other in such a sense as to permit the operation of the rule stated.⁸

⁵ *Flinn v. Hoyle*, 63 Law J. Q. B. 1; *Green v. Kopke*, 18 C. B. 549; *Oelricks v. Ford*, 23 How. (U. S.) 49; *Barry v. Page*, 10 Gray (Mass.) 398; *Kaulback v. Churchill*, 59 N. H. 296; *Taintor v. Prendergast*, 3 Hill (N. Y.) 72, 38 Am. Dec. 618; *Kirkpatrick v. Stainer*, 22 Wend. (N. Y.) 244; *Barham v. Bell*, 112 N. C. 131.

⁶ *Elbinger Actien-Gesellschaft v. Claye*, L. R. 8 Q. B. 313; *Hutton v. Bulloch*, L. R. 9 Q. B. 572. See *Bowstead*, Dig. of Agency, art. 91.

⁷ *Barry v. Page*, 10 Gray (Mass.) 398; *Taintor v. Prendergast*, 3 Hill (N. Y.) 72, 38 Am. Dec. 618; *Story*, Agency, § 420.

⁸ *Barham v. Bell*, 112 N. C. 131.

§ 526. Liability on contracts made in the name of the agent.

If an agent, in making a contract, intends to contract for his principal and discloses his name as well as his existence, but makes the contract in his own name, the transaction and the intention, if the contract is a simple contract, and not a negotiable or sealed instrument, may be shown by parol evidence, and when such an intention is shown, the principal may maintain an action on the contract.⁹ And the fact that the agent had a qualified interest in the subject-matter of the contract, as against his principal, does not impair the principal's right of action against the third party on the contract, especially where the agent's interest is satisfied before the action is brought.¹⁰ Where the principal is known, and the contract is made in reference to property belonging to the principal, the presumption is that he is the contracting party, though the contract is made in the agent's name, and the principal may sue thereon, unless it clearly appears that the agent contracted on his own account, and that, with a knowledge of all the facts, the third party elected to hold the agent.¹¹ Thus, a corporation may maintain an action upon a written contract, throughout the body of which it is mentioned as one of the contracting parties, the contract having been accepted by the other contracting party and acted upon by both as valid, although the contract is signed by the agents of the corporation in their own names only, without words to

⁹ *Moline Malleable Iron Co. v. York Iron Co.*, 83 Fed. 66, 27 C. C. A. 442. See ante, § 339. Compare, as to written contracts, *Chandler v. Coe*, 54 N. H. 561; *United States v. Parmele*, 1 Paine, 252, Fed. Cas. No. 15,997.

Where on the face of a contract it purports to have been made by or with an agent having no direct or beneficial interest in the transaction, suit thereon should be brought in the name of the principal. *Bayley v. Onondaga County Mut. Ins. Co.*, 6 Hill (N. Y.) 476, 41 Am. Dec. 759.

¹⁰ *Moline Malleable Iron Co. v. York Iron Co.*, 83 Fed. 66, 27 C. C. A. 442; *Merrill v. Thomas*, 7 Daly (N. Y.) 393; *Balderston v. National Rubber Co.*, 18 R. I. 338; *Hill v. Georgia, C. & N. R. Co.*, 43 S. C. 461.

¹¹ *Moline Malleable Iron Co. v. York Iron Co.*, 83 Fed. 66, 27 C. C. A. 442. See post, § 533.

designate that they signed as agents.¹² So where a purchaser of goods from an agent knows whom he is agent for, and that the goods in question are of the principal's manufacture, and where the invoice calls attention to the agency and to the principal's ownership, the purchaser is liable to the principal for the agreed price.¹³ And in such cases, the purchaser from the agent cannot set off against his debt to the principal a sum owing to him from the agent.¹⁴ A principal may maintain an action for breach of warranty on a sale, against the seller, though the latter declined giving credit to the principal, but took the agent's individual note for the property.¹⁵

This does not apply, however, to a contract under seal in which the principal is not named or described, for it is only the parties named or described in a contract under seal who can sue or be sued thereon.¹⁶ The same is true of negotiable instruments.¹⁷

§ 527. Liability of third persons to principal on quasi contracts.

A principal may, by reason of transactions through his agent, be entitled to maintain actions quasi ex contractu against third persons, as an action for money had and received to recover money paid by mistake, or money obtained by duress or fraud.

— **Action for money paid under a mistake.** As a general rule, whenever a person pays money to another under such a mistake as to a material fact as to create a belief in the existence of a liability to pay which does not really exist, he may recover back the money in an action for money had and received to his use.¹⁸ Under this rule a principal, whose

¹² *Lamson & G. Mfg. Co. v. Russell*, 112 Mass. 387.

¹³ *Moline Malleable Iron Co. v. York Iron Co.*, 83 Fed. 66, 27 C. C. A. 442.

¹⁴ *Moline Malleable Iron Co. v. York Iron Co.*, 83 Fed. 66, 27 C. C. A. 442.

¹⁵ *White v. Owen*, 12 Vt. 361.

¹⁶ See ante, § 463; post, § 535.

¹⁷ See ante, § 464; post, § 536.

¹⁸ *Hammon*, Cont. 121.

agent has paid money to another under a mistake of fact, may maintain an action against the person receiving the same to recover it back as received to his use. The fact that the money was paid by his agent, or that it was paid by him under a mistake originating with his agent, is immaterial, for the payment and mistake of the agent is the payment and mistake of the principal.¹⁹

— **Action for money obtained under duress or fraud.** In like manner a principal may maintain an action in a proper case to recover back money paid out by his agent under duress or fraud practiced upon him or upon his agent. It is a general rule that where a person obtains money from another by duress or fraud, the other may recover it back in an action for money had and received to his use.²⁰ Where, therefore, an agent pays money of his principal under fraud or duress practiced either upon himself or his principal, the principal may maintain an action against the person receiving the same to recover it back.²¹ Thus, where an agent, to whom cotton had been assigned for sale on commission, pays to a wharf owner illegal charges for weighing and storage, the principal may maintain an action against the wharf owner for the amount so paid.²²

— **Action to recover money diverted by agent** In most jurisdictions, a principal may also maintain an action quasi ex contractu for money had and received, to recover money fraudulently paid by his agent to a third person in breach of his trust, if the person receiving the money had notice of the breach of trust, or has not parted with anything in return for the money.²³

¹⁹ *United States v. Bartlett*, 2 Ware (Dav. 9) 17, Fed. Cas. No. 14,532; *Holmes v. Lucas County*, 53 Iowa, 211; *Talbot v. National Bank*, 129 Mass. 67, 37 Am. Rep. 302; *Lane v. Pere Marquette Boom Co.*, 62 Mich. 63.

²⁰ *Hammon*, Cont. 184, 666.

²¹ *Stevenson v. Mortimer*, Cowp. 805; *Demarest v. New Barbadoes*, 40 N. J. Law, 604; *Holman v. Frost*, 26 S. C. 290. As to right of principal to recover money lost by his agent in gambling transactions, see post, § 551.

²² *Holman v. Frost*, 26 S. C. 290.

²³ Post, § 543.

II. RIGHT OF UNDISCLOSED PRINCIPAL TO SUE ON CONTRACTS.

§ 528. In general.

The liability of an undisclosed principal to be sued on a contract has been considered in a former chapter.²⁴ We come now to consider the right of an undisclosed principal to sue.

It is a well settled general principle of the law of contracts, subject to some exceptions or apparent exceptions, that "a contract cannot confer rights on a person who is not a party to it so as to entitle him to sue in his own name for its breach,"²⁵ for a person has a right to say with whom he will enter into contracts;²⁶ and it has been contended that this principle prevents an undisclosed principal from maintaining an action on a contract. The contrary, however, is now well settled, on the ground that by reason of the fiction of identity of principal and agent, the undisclosed principal becomes a party to the contract through his agent. It is held, therefore, that where a person enters into a simple contract, other than a negotiable instrument, in his own name, but in fact as agent for an undisclosed principal, the principal may come in and sue the third person on the contract; and that this is true, not only where the agent discloses the existence, but not the name, of the principal, but also where he does not even disclose the existence of a principal. The fact that the other party to the contract does not know of the existence of the principal, and intends a contract with the agent personally, while it gives him a right to sue the agent,²⁷ or the principal,²⁸ at his option, it does not prevent the principal from introducing parol evidence to show that the contract was made for his benefit, and from suing him on the contract.²⁹ Since an undisclosed

²⁴ Ante, § 457 et seq.

²⁵ Hammon, Cont. 706.

²⁶ See Boulton v. Jones, 2 Hurl. & N. 564; Boston Ice Co. v. Potter, 123 Mass. 28; Schmalzing v. Thomlinson, 6 Taunt. 147.

²⁷ Post, § 568.

²⁸ Ante, § 457 et seq.

²⁹ England: Wilson v. Hart, 7 Taunt. 295; Mildred v. Maspons,

principal may be sued on a contract, the principle of mutuality requires that he shall also have the right to sue; and the fact that the agent was acting under a *del credere* commis-

8 App. Cas. 874; *Langton v. Waite*, L. R. 6 Eq. 165; *Cothay v. Fennell*, 10 Barn. & C. 671.

United States: *Ford v. Williams*, 21 How. 287; *Darrow v. Horne Produce Co.*, 57 Fed. 463; *Prichard v. Budd*, 22 C. C. A. 504, 76 Fed. 710; *Buchanan v. Cleveland Linseed Oil Co.*, 91 Fed. 88.

Alabama: *Bell v. Reynolds*, 78 Ala. 511, 56 Am. Rep. 52, 58; *Powell v. Wade*, 109 Ala. 95, 55 Am. St. Rep. 915; *McFadden v. Henderson*, 128 Ala. 221.

Arkansas: *Caldwell v. Meshew*, 44 Ark. 564.

California: *Ruiz v. Norton*, 4 Cal. 355, 60 Am. Dec. 618.

Colorado: *Parker v. Cochrane*, 11 Colo. 363.

Georgia: *Woodruff v. McGehee*, 30 Ga. 158; *Peel v. Shepherd*, 58 Ga. 365; *Rosser v. Darden*, 82 Ga. 219, 14 Am. St. Rep. 152; *McConnell v. East Point Land Co.*, 100 Ga. 129.

Illinois: *Burton v. Goodspeed*, 69 Ill. 237; *Conklin v. Leeds*, 58 Ill. 178; *Saladin v. Mitchell*, 45 Ill. 79; *Stockbarger v. Sain*, 69 Ill. App. 436.

Iowa: *Darling v. Noyes*, 32 Iowa, 96. A father may enforce a contract entered into by his son as agent, though undisclosed.

Kansas: *St. Louis, K. C. & N. R. Co. v. Thacher*, 13 Kan. 564; *Carter v. George*, 30 Kan. 45, 48.

Kentucky: *Tutt v. Brown*, 5 Litt. 1, 15 Am. Dec. 33; *Violett v. Powell*, 10 B. Mon. 347, 52 Am. Dec. 548.

Maine: *Pitts v. Mower*, 18 Me. 361, 36 Am. Dec. 727; *Putnam v. White*, 76 Me. 551, 554; *Machias Hotel Co. v. Coyle*, 35 Me. 405, 58 Am. Dec. 712; *Cushing v. Rice*, 46 Me. 303, 71 Am. Dec. 579.

Maryland: *Miller v. Lea*, 35 Md. 396, 6 Am. Rep. 417; *Baltimore Coal Tar & Mfg. Co. v. Fletcher*, 61 Md. 288; *Oelrichs v. Ford*, 21 Md. 489.

Massachusetts: *Huntington v. Knox*, 7 Cush. 371; *Eastern R. Co. v. Benedict*, 5 Gray, 561, 66 Am. Dec. 384; *Ilisley v. Merriam*, 7 Cush. 242, 54 Am. Dec. 721; *Foster v. Graham*, 166 Mass. 202.

Minnesota: *Ames v. First Div. St. Paul & P. R. Co.*, 12 Minn. 413 (Gil. 295); *Haines v. Starkey*, 82 Minn. 230.

Mississippi: *Stonewall Mfg. Co. v. Peek*, 63 Miss. 342.

Missouri: *Briggs v. Munchon*, 56 Mo. 467; *Odessa Bank v. Jennings*, 18 Mo. App. 651; *Kelly v. Thuey*, 143 Mo. 422, overruling 102 Mo. 522.

New Hampshire: *Elkins v. Boston & M. R. R.*, 19 N. H. 337, 51 Am. Dec. 184; *Bryant v. Wells*, 56 N. H. 152; *Chandler v. Coe*, 54 N. H. 561.

sion does not affect this rule.³⁰ Thus, where an agent purchases goods without disclosing his principal, the property immediately upon the execution of the contract vests in the principal, and he may maintain an action against the seller upon an implied warranty or upon the contract itself.³¹ The agent is a competent witness for the principal, where it is sought to show that a contract was made for the latter's

New York: Taintor v. Prendergast, 3 Hill, 72, 38 Am. Dec. 618; Nicoll v. Burke, 78 N. Y. 580; Wiehle v. Safford, 27 Misc. 562.

North Carolina: Barham v. Bell, 112 N. C. 131; Brown v. Morris, 83 N. C. 251, 254.

Ohio: Crosby v. Hill, 39 Ohio St. 100.

Pennsylvania: Girard v. Taggart, 5 Serg. & R. 19, 9 Am. Dec. 327; Gilpin v. Howell, 5 Pa. 41, 45 Am. Dec. 720; Merrick's Estate, 5 Watts & S. 9.

South Carolina: Dupont v. Mt. Pleasant Ferry Co., 9 Rich. Law, 255, 258; Munroe v. Williams, 35 S. C. 572.

Tennessee: Foster v. Smith, 2 Cold. 474, 88 Am. Dec. 604.

Texas: Pacific Exp. Co. v. Redman (Tex. Civ. App.) 60 S. W. 677.

Vermont: Edwards v. Golding, 20 Vt. 30; Arlington v. Hinds, 1 D. Chip. 431, 12 Am. Dec. 704; Culver v. Bigelow, 43 Vt. 249.

Virginia: Waddill v. Seebree, 88 Va. 1012, 29 Am. St. Rep. 766; National Bank of Va. v. Nolting, 94 Va. 263.

West Virginia: Deitz v. Providence Wash. Ins. Co., 31 W. Va. 851, 13 Am. St. Rep. 909; Coulter v. Blatchley, 51 W. Va. 163.

It is a well settled rule, that "whenever an express contract is made, an action is maintainable upon it, either in the name of the person with whom it was actually made, or in the name of the person with whom, in point of law, it was made." Cothay v. Fennell, 10 Barn. & C. 671.

Where an agent has taken insurance for his principal, who is undisclosed, and the policy or certificate is in the name of the agent and not disclosing the agency, and the agent has no insurable interest in the property, a recovery in the name of such undisclosed principal is sustainable. New Orleans Ins. Co. v. Spruance, 13 Ill. App. 576; De Vignier v. Swanson, 1 Bos. & P. 346, note.

³⁰ Hornby v. Lacy, 6 Maule & S. 166; Gardner v. Allen's Ex'rs, 6 Ala. 187, 41 Am. Dec. 45; Miller v. Lea, 35 Md. 396, 6 Am. Rep. 417; Hogan v. Shorb, 24 Wend. (N. Y.) 458; Foster v. Smith, 2 Cold. (Tenn.) 474, 88 Am. Dec. 604.

³¹ Lowry v. Beckner, 5 B. Mon. (Ky.) 44; Cushing v. Rice, 46 Me. 303, 71 Am. Dec. 579; Tainter v. Lombard, 53 Me. 369, 87 Am. Dec. 552; Odessa Bank v. Jennings, 18 Mo. App. 651; Waldo v. Peck, 7 Vt. 437.

benefit, to prove the contract and to show that it was in fact made for the principal, though the latter was undisclosed at the time it was entered into.³²

It is of course necessary that the contract should have been made by the agent within the scope of his authority, or if previously unauthorized, that it should have been subsequently ratified by the principal;³³ and if the rights of the third party are not injuriously affected by want of notice that the person with whom he was dealing was acting as agent for another party who is suing on the contract, the fact of such agency may be shown by conversations between the principal and agent not in the presence of the third party.³⁴

It is also necessary that the contract should be made for the benefit of the principal alone; and if it is made for the benefit of both the principal and agent or another, unless the contract is a divisible one, the principal cannot sue separately on that part of the contract which is for his benefit.³⁵ Where, however, the action is not upon the contract, but is an action in tort for damages for injury to property, the principal and agent need not join their causes of action, but each may sue separately for the injury to his property, though the injury to the property of both was caused at the same time and the property was together at the time, under a single contract made by the agent, without disclosing his principal.³⁶

As a necessary result of the doctrine that an undisclosed principal may both sue and be sued on a contract, there may be a contract with an undisclosed principal on each side. If A and B enter into a contract respectively as agents for C and D, without disclosing the existence of their principals,

³² *Gilpin v. Howell*, 5 Pa. 41, 45 Am. Dec. 720; *Oelrichs v. Ford*, 21 Md. 489; *Edwards v. Golding*, 20 Vt. 30.

³³ *Ruiz v. Norton*, 4 Cal. 355, 60 Am. Dec. 618; and see cases cited in preceding note.

³⁴ *Rice & B. Malting Co. v. International Bank*, 185 Ill. 422.

³⁵ *Roosevelt v. Doherty*, 129 Mass. 301, 37 Am. Rep. 359.

³⁶ *St. Louis, K. C. & N. R. Co. v. Thacher*, 13 Kan. 564.

there is a contract between C and D, upon which either may maintain an action against the other.³⁷

§ 529. Application to written contracts.

The doctrine that an undisclosed principal may maintain an action on a contract is not limited to oral contracts, but applies also to contracts in writing, other than contracts under seal,³⁸ and negotiable instruments.³⁹ But in order that the undisclosed principal may maintain an action on such a contract, he must show, the burden of proof being on him, the agency and the power of the agent to bind him, at the time of the making of the contract,⁴⁰ and for this purpose he may introduce parol evidence, for with the two exceptions above noted, the rule excluding parol evidence to contradict or vary a written contract does not exclude parol evidence to show that a person named in a written contract, or signing the same, was the agent of an undisclosed principal.⁴¹ It is immaterial that the contract is required by the statute of frauds to be in writing.⁴² This statute "does

³⁷ *Darrow v. Horne Produce Co.*, 57 Fed. 463.

³⁸ Post, § 535.

³⁹ Post, § 536.

⁴⁰ *Ruiz v. Norton*, 4 Cal. 355, 60 Am. Dec. 618; *Powell v. Wade*, 109 Ala. 95, 55 Am. St. Rep. 915; *Oelrichs v. Ford*, 21 Md. 489; and see cases cited in next note.

⁴¹ *Salmon Falls Mfg. Co. v. Goddard*, 14 How. (U. S.) 446; *Ford v. Williams*, 21 How. (U. S.) 287; *Darrow v. Horne Produce Co.*, 57 Fed. 463; *Powell v. Wade*, 109 Ala. 95, 55 Am. St. Rep. 915; *Ruiz v. Norton*, 4 Cal. 355, 60 Am. Dec. 618; *Oelrichs v. Ford*, 21 Md. 489; *Huntington v. Knox*, 7 Cush. (Mass.) 371; *Odessa Bank v. Jennings*, 18 Mo. App. 651; *Briggs v. Munchon*, 56 Mo. 467; *State v. O'Neill*, 74 Mo. App. 134; *Chandler v. Coe*, 54 N. H. 561; *Nicoll v. Burke*, 78 N. Y. 580; *Barham v. Bell*, 112 N. C. 131; *Brown v. Morris*, 83 N. C. 251; *Deltz v. Providence Wash. Ins. Co.*, 31 W. Va. 851, 13 Am. St. Rep. 909. And other cases cited ante, note 29. Correspondence between the principal and agent is competent and admissible evidence to prove that a contract was made by an agent for and on behalf of a principal. *Oelrichs v. Ford*, 21 Md. 489.

⁴² *Higgins v. Senior*, 8 Mees. & W. 834; *Salmon Falls Mfg. Co. v. Goddard*, 14 How. (U. S.) 446; *Kingsley v. Siebrecht*, 92 Me. 23, 69 Am. St. Rep. 486; *Byington v. Simpson*, 134 Mass. 169; *Huntington v. Knox*, 7 Cush. (Mass.) 371; *Hunter v. Giddings*, 97 Mass.

not change the law as to the rights and liabilities of principals and agents, either as between themselves, or as to third persons. The provisions of the statute are complied with if the names of competent contracting parties appear in the writing, and, if a party be an agent, it is not necessary that the name of the principal shall be disclosed in the writing."⁴³

Such proof does not vary or contradict the writing, but merely establishes a separate collateral fact, namely the relation between the party contracting for him, and for whose benefit the contract is made; or in other words the authority, under which the agent acts, out of which grow the rights and obligations of the principal under the contract.⁴⁴ For "the rights and liabilities of a principal, upon a written instrument executed by his agent, do not depend upon the fact of the agency appearing on the instrument itself, but upon the facts: (1) That the act is done in the exercise, and (2) within the limits, of the powers delegated; and these are necessarily inquirable into by evidence."⁴⁵

Thus, where a written lease not under seal is made in the name of an agent, without disclosing his principals, the owners of the premises, for whose benefit the lease was in fact made, may bring an action in their own name to recover rent due.⁴⁶ So where an agent purchases goods, without disclosing his principal, the contract of sale being in writing, the principal may sue on a warranty therein.⁴⁷ Or where a chattel mortgage is given to an agent, the principal, though undisclosed, may assert his rights as if named in the mortgage and show his relation by parol evidence.⁴⁸

41, 93 Am. Dec. 54; *Borcherling v. Katz*, 37 N. J. Eq. 150; *Beebe v. Robert*, 12 Wend. (N. Y.) 413, 27 Am. Dec. 132; *Barham v. Bell*, 112 N. C. 131. And other cases cited ante, § 528.

⁴³ *Kingsley v. Siebrecht*, 92 Me. 23, 69 Am. St. Rep. 486.

⁴⁴ *Oelrichs v. Ford*, 21 Md. 489.

⁴⁵ *Huntington v. Knox*, 7 Cush. (Mass.) 371. And see *Mechanics Bank v. Bank of Columbia*, 5 Wheat. (U. S.)³²⁶; *Deltz v. Providence Wash. Ins. Co.*, 31 W. Va. 851, 13 Am. St. Rep. 909.

⁴⁶ *Nicoll v. Burke*, 78 N. Y. 580; *Bryant v. Wells*, 56 N. H. 152.

⁴⁷ *Beebe v. Robert*, 12 Wend. (N. Y.) 413, 27 Am. Dec. 132.

⁴⁸ *State v. O'Neill*, 74 Mo. App. 134.

§ 530. Exceptions to the rule that an action may be maintained by undisclosed principal.

To the doctrine that where a person enters into a contract in his own name for an undisclosed principal, the latter may maintain an action thereon, there are several exceptions and modifications.

(1) His right to do so may be defeated by the state of accounts or equities between the agent and the third person.

(2) The principal may be estopped by his conduct to maintain the action.

(3) The principal cannot sue if there was a clearly expressed intention on the part of the third person to deal only with the agent personally.

(4) Nor can he sue where there is a written contract which by its express terms shows that the agent represented himself therein to be the real principal.

(5) The rule allowing an undisclosed principal to sue does not apply to contracts under seal.

(6) Nor does it apply to negotiable instruments.

§ 531. Exception based on state of accounts or equities between third person and agent.

The doctrine that an undisclosed principal in whose behalf a contract has been made may maintain an action against the other party is subject to the exception that he cannot do so, where the other party believed that he was contracting with the agent as principal, the existence of the principal being undisclosed, if the state of accounts or equities between the third person and the agent is such that to hold the former liable to the undisclosed principal would place him in a worse position than if he had in fact contracted with the agent personally.⁴⁹ This exception applies

⁴⁹ *Montagu v. Forwood* [1893] 2 Q. B. 350; *Ex parte Dixon*, 4 Ch. Div. 133; *Stevens v. Biller*, 25 Ch. Div. 31; *Gardner v. Allen's Ex'r*, 6 Ala. 183; *Peel v. Shepherd*, 58 Ga. 365; *Eclipse Wind Mill Co. v. Thorson*, 46 Iowa, 181; *Wood v. Boylston Nat. Bank*, 129 Mass. 358, 37 Am. Rep. 366; *Taintor v. Prendergast*, 3 Hill (N. Y.) 72, 38 Am. Dec. 618. As to general rule in regard to defenses available to third person against principal, see post, § 537.

even when the agent acted without authority and contrary to the instructions of his principal in contracting in his own name.⁵⁰

This exception does not apply, however, unless the existence, and not merely the name, of the principal was undisclosed, and the third person believed that he was dealing with the agent as the principal. If he knew that the agent was acting for another and not as principal, although the name of the principal may not have been disclosed, he is liable to the principal irrespective of any claims or equities which may exist between him and the agent.⁵¹ Thus, a discharge under a state insolvent law does not bar an action by a nonresident principal for the price of goods sold by his factor residing within the state to the insolvent, though the bills were made out in the factor's name as vendor, where he informed the debtor that he was selling on commission for a person in another state.⁵² It has also been held that if the third party has knowledge of circumstances sufficient to put him upon inquiry as to the existence of the agency, and he does not make such inquiry, this exception will not apply.⁵³

As between an agent and his undisclosed principal for whom he has entered into a contract, the principal has the right to sue on the contract⁵⁴ and the other party to the contract cannot deprive him of this superior right by paying or settling with the agent after he has received notice from the principal that he intends to insist upon his rights. If he does so, he will remain liable to the principal.⁵⁵ The same is true, at least so far as performance of the services is concerned, of a contract by which the agent agrees to ren-

⁵⁰ *Ex parte Dixon*, 4 Ch. Div. 133; *Stevens v. Biller*, 25 Ch. Div. 31; *Eclipse Wind Mill Co. v. Thorson*, 46 Iowa, 181.

⁵¹ *Isley v. Merriam*, 7 Cush. (Mass.) 242, 54 Am. Dec. 721; *Evans v. Waln*, 71 Pa. 69. See post, § 538.

⁵² *Isley v. Merriam*, 7 Cush. (Mass.) 242, 54 Am. Dec. 721.

⁵³ *Miller v. Lea*, 35 Md. 396, 6 Am. Rep. 417; *Evans v. Waln*, 71 Pa. 69; *Cooke v. Eshelby*, 12 App. Cas. 271. See post, § 538.

⁵⁴ See post, § 542.

⁵⁵ *Pitts v. Mower*, 18 Me. 361, 36 Am. Dec. 727; *Huntington v. Knox*, 7 Cush. (Mass.) 371.

der professional (as in the case of an attorney) or other services, in which skill, learning, or other special qualifications must have been a material consideration.⁵⁶ Thus, if an agent enters into a contract in his own name, without disclosing his agency, with a third person for the performance of services requiring the exercise of skill, learning, or other special personal qualifications, and such contract is unexecuted, the undisclosed principal cannot step in and require the third person to accept the performance of those services by him.⁵⁷ If, however, the agent has fully performed the contract on his part, and the contract is not made with the agent exclusively, as the ostensible principal, the undisclosed principal may compel the third party to render the performance of his part of the contract to him instead of to the agent.⁵⁸

§ 532. Exception based upon estoppel of principal.

Another exception to the rule allowing an undisclosed principal to sue on a contract is based on the doctrine of equitable estoppel. An undisclosed principal is estopped to sue the third person on a contract, where, either by representing that the agent was dealing as principal, or by standing by and allowing him to do so, he has induced the other party to change his position in such a way that he would be prejudiced if the principal were allowed to maintain an action against him.⁵⁹

⁵⁶ *Eggleston v. Boardman*, 37 Mich. 14; *Grojan v. Wade*, 2 Starkie, 443; *Boulton v. Jones*, 2 Hurl. & N. 564; *Boston Ice Co. v. Potter*, 123 Mass. 28, 25 Am. Rep. 9; *King v. Batterson*, 13 R. I. 117, 43 Am. Rep. 13. It has been held that the general rules as to the right of an undisclosed principal to sue apply the same in cases where the contract with the agent involves personal trust and confidence as in other cases; and that a broker may sue upon a contract of purchase made by his agent for a third person, though he was undisclosed, and though the purchaser made a special contract with the agent for services and compensation. *Warder v. White*, 14 Ill. App. 50.

⁵⁷ *Eggleston v. Boardman*, 37 Mich. 14.

⁵⁸ *Grojan v. Wade*, 2 Starkie, 443; *Sullivan v. Shailor*, 70 Conn. 733.

⁵⁹ *Ferrand v. Bischoffsheim*, 4 C. B. (N. S.) 710.

§ 533. Exception where the contract was with the agent exclusively.

A third exception to the general rule allowing an action by an undisclosed principal is in cases in which it clearly appears, either from express recitals or the circumstances attending the making of the contract, or from the relation of the parties or the nature of the contract, that it was the intention of the third person to deal exclusively with the agent as principal.⁶⁰ Such an intention may be inferred from the nature of the contract, as where it involves a fiduciary relation, or relation of special trust and confidence between the third person and the agent.⁶¹ Every man has a right to elect what parties he will deal with. He has a right to the benefit he contemplates from the character, credit, and substance of the person with whom he contracts. There may be good reasons why he should be willing to deal with one person and unwilling to deal with another; and as his right to refuse to enter into a contract is absolute, he is not obliged to submit the validity of his reasons to a court or jury.⁶² This exception applies where a written contract expressly states, or shows by its recitals, the intention to deal exclusively with the agent as principal.⁶³ Thus, where an agent, in making a charter party, described himself therein as owner of the ship, it was held that the contract was with him as principal, and that his undisclosed principal could not sue thereon.⁶⁴ It also applies in the case of an oral contract, as where one purchases oxen from another who represents himself to be the owner thereof, and that another person, with whom the purchaser is unwilling to deal, has no interest therein, and it turns

⁶⁰ *Humble v. Hunter*, 12 Q. B. 310; *Whiting v. William H. Crawford Co.*, 93 Md. 390; *Winchester v. Howard*, 97 Mass. 303, 93 Am. Dec. 93; *Eggleston v. Boardman*, 37 Mich. 14; *King v. Batterson*, 13 R. I. 117, 43 Am. Rep. 13.

⁶¹ *Eggleston v. Boardman*, 37 Mich. 14.

⁶² *Winchester v. Howard*, 97 Mass. 303, 93 Am. Dec. 93; *Humble v. Hunter*, 12 Q. B. 310.

⁶³ *Humble v. Hunter*, 12 Q. B. 310.

⁶⁴ *Humble v. Hunter*, 12 Q. B. 310.

out that the latter person is the owner of the oxen. In such case the true owner cannot maintain an action against the purchaser for the price of the oxen, where the latter returns them as soon as he discovers that the plaintiff is the owner.⁶⁵

§ 534. Exception where parol evidence would vary written contract.

As has been seen, the rule allowing an undisclosed principal to sue on a written contract in which his agent is named as a party, or which is signed by the agent in his own name, is not regarded as a violation of the rule excluding parol evidence to vary or contradict a written contract.⁶⁶ Such a case is very different, however, from one in which a person by the express recitals or terms of a written contract represents or states that he is the principal. In such a case, if he was in fact acting for an undisclosed principal, the latter cannot sue on the contract, for the express terms or recitals of the contract would be contradicted and varied, and the rule of evidence violated, by parol evidence that the agent was not the real principal.⁶⁷

§ 535. Exception in the case of contracts under seal.

Since no one but the parties named in a contract under seal can either sue or be sued thereon, an undisclosed principal cannot maintain an action on a contract under seal in which the agent only is named or described. The right to sue is in the agent, or in the principal in the name of the agent.⁶⁸ Thus, an executrix of an estate cannot sue on a sealed lease, of the premises of such estate, by her agent in

⁶⁵ *Winchester v. Howard*, 97 Mass. 303, 93 Am. Dec. 93.

⁶⁶ *Ante*, § 529.

⁶⁷ *Humble v. Hunter*, 12 Q. B. 310; *Schmaltz v. Avery*, 16 Q. B. 655; *Darrow v. Horne Produce Co.*, 57 Fed. 463.

⁶⁸ *Sims v. Bond*, 5 Barn. & Adol. 389; *Clarke v. Courtney*, 5 Pet. (U. S.) 319; *Equitable Life Assur. Soc. v. Smith*, 25 Ill. App. 471; *Stockbarger v. Sain*, 69 Ill. App. 436; *Violet v. Powell*, 10 B. Mon. (Ky.) 347, 52 Am. Dec. 548; *Henricus v. Englert*, 137 N. Y. 488; *Briggs v. Partridge*, 64 N. Y. 357, 21 Am. Rep. 617; *Schaefer v. Henkel*, 75 N. Y. 378; *Barham v. Bell*, 112 N. C. 131; *Cocke v. Dickens*, 4 Yerg. (Tenn.) 35, 26 Am. Dec. 214.

his own name, where it does not appear from the lease who was the principal, though the word "agent" is appended to the agent's signature.⁶⁹

§ 536. Exception in the case of negotiable instruments.

The same is true of negotiable instruments. Since it is a settled rule of the law merchant that only the parties to a negotiable instrument can sue or be sued thereon, if a bill or note is made payable to an agent in his own name only, his undisclosed principal cannot sue thereon unless he obtains the right to sue by indorsement or transfer. He cannot sue as undisclosed principal.⁷⁰

This rule, however, does not prevent the admission of parol evidence to show who was intended as payee where there is an ambiguity in this respect on the face of the instrument, and by the weight of authority, there is an ambiguity, so as to authorize the introduction of such evidence, where the name of the payee is followed by the word "agent," or "cashier," and the like.⁷¹ This subject has been fully treated in a former chapter.⁷²

§ 537. Defenses of third person—Equities against agent—Generally.

An undisclosed principal's right to sue in his own name upon a contract made for his benefit by his agent, in the latter's own name, is subject, however, to any defense or set-off that the third party might have had against the agent had the suit been brought by the latter in his own name.

⁶⁹ *McColgan v. Katz*, 29 Misc. (N. Y.) 136.

⁷⁰ *Grist v. Backhouse*, 20 N. C. (4 Dev. & B.) 496; *U. S. Bank v. Lyman*, 1 Blatchf. 297, Fed. Cas. No. 924; *Moore v. Penn*, 5 Ala. 135; *Fuller v. Hooper*, 3 Gray (Mass.) 341; *Chandler v. Coe*, 54 N. H. 561. And see ante, § 327 et seq.

⁷¹ *Baldwin v. Bank*, 1 Wall. (U. S.) 234; *Commercial Bank v. French*, 21 Pick. (Mass.) 486, 32 Am. Dec. 280; *Nave v. First Nat. Bank*, 87 Ind. 204.

A different rule applies to the addition of the word "agent," "cashier," etc., after the name of a maker, drawer, etc. See ante, 327 et seq.

⁷² Ante, § 310 et seq.

Some of these defenses have been considered in the preceding section, in the way of exceptions to the general rule that an undisclosed principal may sue on contracts made by his agent in his own name, and it is the purpose to treat here the general rule that an undisclosed principal's right of action is subject to any set-off or defense that the third person may have against the agent at the time he discovers or is notified of the principal's rights in the contract.

As a principal may take the benefits of all contracts entered into by his agent for him, it is but right and proper that he should also bear the burdens. He cannot accept the benefits of such contracts, and at the same time refuse to recognize any rights the third person may have acquired as to such contracts in his dealings with the agent. It is a well settled general rule therefore that where an undisclosed principal sues on a contract made by his agent in his own name, such suit is subject to any defense or set-off acquired by the third party against the agent, before he discovered or had notice of the principal's rights, and which might have been pleaded to a suit brought by the agent in his own name on such contract.⁷² And the fact that the agent acted

⁷² *England*: Gibson v. Winter, 5 Barn. & Adol. 96; George v. Clagett, 7 Term R. 359; Rabone v. Williams, 7 Term R. 360, note; Sims v. Bond, 5 Barn. & Adol. 389.

United States: Leeds v. Marine Ins. Co., 6 Wheat. 565; Buchanan v. Cleveland Linseed-Oil Co., 91 Fed. 88.

Alabama: Gardner v. Allen's Ex'r, 6 Ala. 187, 41 Am. Dec. 45.

California: Amann v. Lowell, 66 Cal. 306; Ruiz v. Norton, 4 Cal. 355, 60 Am. Dec. 618.

Connecticut: Sullivan v. Shallor, 70 Conn. 733.

Georgia: Woodruff v. McGhie, 30 Ga. 158; Rosser v. Darden, 82 Ga. 219, 14 Am. St. Rep. 152; Ruan v. Gunn, 77 Ga. 53; McConnell v. East Point Land Co., 100 Ga. 129.

Illinois: Stinson v. Gould, 74 Ill. 80; Saladin v. Mitchell, 45 Ill. 79.

Indiana: Nave v. Hadley, 74 Ind. 155.

Kentucky: Violet v. Powell, 10 B. Mon. 347, 52 Am. Dec. 548; Tutt v. Brown, 5 Litt. 1, 15 Am. Dec. 33.

Maine: Traub v. Milliken, 57 Me. 63, 2 Am. Rep. 14.

Maryland: Oelrichs v. Ford, 21 Md. 489, 507; Baltimore Coal Tar & Mfg. Co. v. Fletcher, 61 Md. 288; York County Bank v. Stein, 24 Md. 447.

contrary to instructions, in contracting in his own name, does not prevent the application of this rule.⁷⁴ Unless the principal desires to run the risk of having his claim met by the set-off of a demand due from the agent to the person dealing with him, he must give notice of his rights at the time the agent is dealing and before the third party has acquired any rights of set-off or defense. But such a defense will not be allowed to a defendant, in such cases, under an answer consisting only of a general denial and payment.⁷⁵

In accordance with this rule, if an agent sells goods in his own name, without disclosing his agency, the purchaser may set off a debt due him by the agent in a suit by the principal for the purchase money;⁷⁶ and it makes no difference whether the sale by the agent was under a *del credere* commission or not; the reason of the law is the same in both cases.⁷⁷ Nor is it necessary that this set-off exist at the time of the

Massachusetts: *Ilsley v. Merriam*, 7 Cush. 242, 54 Am. Dec. 721; *Locke v. Lewis*, 124 Mass. 1, 26 Am. Rep. 631.

Minnesota: *Baxter v. Sherman*, 73 Minn. 434, 72 Am. St. Rep. 631; *Lough v. Thornton*, 17 Minn. 253.

Missouri: *Bruen v. Kansas City Agricultural & H. F. Ass'n*, 40 Mo. App. 425; *Henderson v. Botts*, 56 Mo. App. 141. And if the contract gave the agent no cause of action the principal can have none.

New Jersey: *Bernshouse v. Abbott*, 45 N. J. Law, 531, 46 Am. Rep. 789.

New York: *Wright v. Cabot*, 47 N. Y. Super. Ct. 229; *Taintor v. Prendergast*, 3 Hill, 72, 38 Am. Dec. 618.

Ohio: *Crosby v. Hill*, 39 Ohio St. 100; *Miller v. Sullivan*, 39 Ohio St. 79.

Pennsylvania: *Frame v. William Penn Coal Co.*, 97 Pa. 309; *Girard v. Taggart*, 5 Serg. & R. 19, 9 Am. Dec. 327; *Belfield v. National Supply Co.*, 189 Pa. 189, 69 Am. St. Rep. 799.

Tennessee: *Foster v. Smith*, 2 Cold. 474, 88 Am. Dec. 604.

⁷⁴ *Ex parte Dixon*, 4 Ch. Div. 133; *Eclipse Wind Mill Co. v. Thorson*, 46 Iowa, 181.

⁷⁵ *Foster v. Graham*, 166 Mass. 202.

⁷⁶ *Gardner v. Allen's Ex'r*, 6 Ala. 187, 41 Am. Dec. 45; *Rosser v. Darden*, 82 Ga. 219, 14 Am. St. Rep. 152; *Baxter v. Sherman*, 73 Minn. 434, 72 Am. St. Rep. 631; *Mitchell v. Bristol*, 10 Wend. (N. Y.) 492. And see other cases in note 73, *supra*.

⁷⁷ *Gardner v. Allen's Ex'r*, 6 Ala. 187, 41 Am. Dec. 45; *George v. Claggett*, 7 Term R. 359; *Mitchell v. Bristol*, 10 Wend. (N. Y.) 492.

sale. It is sufficient if it arise before notice of the real ownership of the goods.⁷⁸ But if before the goods were received, the purchaser had notice of the principal's ownership, then the purchaser was bound to elect either to refuse the goods or to take them as the property of the principal, and keeping them would be an assumption of liability to pay the principal for them.⁷⁹ And if he had received part of the goods before receiving such notice and part afterwards, he would have a right of set off as to the part received before notice but not as to the part received thereafter.⁸⁰

So where goods are deposited in a warehouse in the name of an agent, who is apparently the owner thereof, a pledge of the goods by such agent as security for a loan is valid as against the real owner if the pledgee acted in good faith, and without notice that the pledgor was not the owner.⁸¹

§ 538. Limitations to third person's right of defense or set-off.

In order that this rule may apply, however, it is necessary that at the time the third person acquired or possessed such defense, he should have been dealing with the agent, believing him to be the principal, that is, he should have been ignorant, not only of the name of the principal, but also of his existence. As a basis to his right to plead such defense or set-off, the third person should show that he did not know, or had no means of knowing, that the person with whom he was dealing was acting as agent only.⁸² For if he knows or has reasonable grounds to believe that such person is acting as an agent, although he does not know the principal, any equity or defense acquired by him against the agent after he has obtained such notice is unavailable

⁷⁸ *Baxter v. Sherman*, 73 Minn. 434, 72 Am. St. Rep. 631, 633; and see cases cited in preceding notes.

⁷⁹ *Belfield v. National Supply Co.*, 189 Pa. 189, 69 Am. St. Rep. 799.

⁸⁰ *Belfield v. National Supply Co.*, 189 Pa. 189, 69 Am. St. Rep. 799.

⁸¹ *Amann v. Lowell*, 66 Cal. 306.

⁸² *Semenza v. Brinsley*, 18 C. B. (N. S.) 467; and see cases cited in preceding notes.

to him as a defense to a suit brought by the principal.⁸³ A third person must be cautious, and not act regardless of the rights of the principal, though undisclosed, if he has reasonable grounds to believe that the person with whom he is dealing is but an agent. If the character of such person is equivocal, sometimes dealing on his own account, and sometimes as agent, or the circumstances are such as to put him on inquiry, it is incumbent on one dealing with such person, if he desires to avail himself of a set-off, to inquire in what character he is acting in that particular transaction, and if he fails to do so, and it turns out that such person is acting as agent only, he has sufficient notice of the agency to deprive him of the right to plead his set-off against the principal.⁸⁴ But mere public rumor or knowledge possessed by others in regard to that fact will not be sufficient notice for this purpose.⁸⁵ Upon the question of whether or not a third person had notice of the agency, when dealing with one, such person is himself a competent witness.⁸⁶

— Sales of goods. It is also necessary to the application of this rule, where the agency is one for the sale of goods, that the agent should have possession of the goods themselves,

⁸³ *Dresser v. Norwood*, 17 C. B. (N. S.) 466; *Baring v. Corrie*, 2 Barn. & Ald. 137; *Cooke v. Eshelby*, 12 App. Cas. 271; *Childers v. Bowen*, 68 Ala. 221; *Whelan v. McCreary*, 64 Ala. 319; *Peel v. Shepherd*, 58 Ga. 365; *Miller v. Lea*, 35 Md. 407, 6 Am. Rep. 417; *Baxter v. Sherman*, 73 Minn. 434, 72 Am. St. Rep. 631; *Henderson v. McNally*, 48 App. Div. (N. Y.) 134, affirmed in 168 N. Y. 646; *Bliss v. Bliss*, 7 Bosw. (N. Y.) 347; *Pratt v. Collins*, 20 Hun (N. Y.) 126; *Crosby v. Hill*, 39 Ohio St. 100.

If one buys, from an agent, the goods of his principal, under a misapprehension, not induced by the principal, that the goods belong to the agent, he cannot use as a payment or counterclaim, on a suit by the principal for the value of the goods, a credit given by him to such agent on an individual debt of the latter. *Brown v. Morris*, 83 N. C. 251.

⁸⁴ *Baxter v. Sherman*, 73 Minn. 434, 72 Am. St. Rep. 631; *Fish v. Kempton*, 7 C. B. 687; *Moore v. Clementson*, 2 Camp. 22; *Cooke v. Eshelby*, 12 App. Cas. 271; *Baring v. Currie*, 2 Barn. & Ald. 137; *Miller v. Lea*, 35 Md. 407, 6 Am. Rep. 417.

⁸⁵ *Pratt v. Collins*, 20 Hun (N. Y.) 126.

⁸⁶ *Frame v. William Penn Coal Co.*, 97 Pa. 309.

or of their muniments of title thereto, at the time the third person deals with him in purchasing the goods; for if the agent has neither of these, the person dealing with him cannot be deceived by that circumstance, and that fact alone would be sufficient to put him on inquiry as to the agent's true position in the transaction, and if he fails to make such inquiry, he cannot plead his ignorance of the agency so as to be allowed to set off, against the principal's claim on the contract, any equity he may have against the agent. It would be otherwise, however, if the agent had possession of the goods or their muniments of title, but did not disclose his agency when selling them, and the purchaser in good faith believed him to be the principal.⁸⁷ This application of the rule has been so well stated in a leading English case that it may be well to quote from it. It was there held that in order for a third person to establish a set-off against a principal on a contract of sale entered into by his agent, it was necessary: "(1) That the sale should be made by a person entrusted with the possession of the goods; (2) that the agent should sell the goods as his own, and in his own name as principal, by the authority of the principal; and (3) that the purchaser dealt with the agent as, and believed him to be, the principal in the transaction up to the time when the set-off occurred."⁸⁸ Thus, where an agent, selling goods for an undisclosed principal, and having the goods or indicia of property in his possession, receives payment therefor, the third person may set up such payment as a defense to an action therefor by the principal.⁸⁹ But if the purchaser receives notice of the

⁸⁷ *Borries v. Imperial Ottoman Bank*, L. R. 9 C. P. 38; *Semenza v. Brinzley*, 18 C. B. (N. S.) 467; *Rosser v. Darden*, 82 Ga. 219, 14 Am. St. Rep. 152; *Clark v. Smith*, 88 Ill. 298; *Stinson v. Gould*, 74 Ill. 80; *Traub v. Milliken*, 57 Me. 63, 2 Am. Rep. 14; *Kornemann v. Monaghan*, 24 Mich. 36; *Bernshouse v. Abbott*, 45 N. J. Law, 531, 46 Am. Rep. 789; *Harrison v. Ross*, 44 N. Y. Super. Ct. 230; *Crosby v. Hill*, 39 Ohio St. 100; *Bertoli v. Smith*, 69 Vt. 425.

Payment by a purchaser to an agent selling goods only by sample, and forbidden to receive payment, does not protect him in a suit by the principal for the purchase price. *Butler v. Dorman*, 68 Mo. 298, 30 Am. Rep. 795.

⁸⁸ *Ex parte Dixon*, 4 Ch. Div. 133.

⁸⁹ *Lumley v. Corbett*, 18 Cal. 494; *Peel v. Shepherd*, 58 Ga. 365;

principal's rights before he has made full payment to the agent, that part of the payment made after he has received such notice will not be a good defense against the principal's claim therefor.⁹⁰

In a late Minnesota case, this rule is stated by Judge Mitchell, as follows: "Where an agent sells in his own name for an undisclosed principal and the principal sues the buyer for the price, the buyer cannot set off a debt from the agent, unless, in making the purchase, he was induced by the principal's conduct to believe, and did in fact believe, that the agent was selling on his own account."⁹¹ But this is thought to be too narrow a statement of the rule, for it is not necessary that there should be any active inducement by the principal, to give the third person this right of set-off, save in so far as his remaining concealed may be considered as such.

As will be seen in subsequent chapters of this work, there is a distinction in the application of this rule to a sale of goods by a broker and a sale by a factor; the undisclosed principal's suit, as a general rule, being subject to a set-off

Rice & B. Malting Co. v. International Bank, 185 Ill. 422; *Eclipse Wind Mill Co. v. Thorson*, 46 Iowa, 181; *Pitts v. Mower*, 18 Me. 361, 36 Am. Dec. 727; *Packer v. Hinckley Locomotive Works*, 122 Mass. 484; *Huntington v. Knox*, 7 Cush. (Mass.) 371; *Lough v. Thornton*, 17 Minn. 253; *Butler v. Dorman*, 68 Mo. 302, 30 Am. Rep. 795; *Du Bois v. Perkins*, 21 Or. 189.

⁹⁰ *Rice & B. Malting Co. v. International Bank*, 185 Ill. 422; *Henderson v. McNally*, 48 App. Div. 134, affirmed in 168 N. Y. 646; *Whelan v. McCreary*, 64 Ala. 319.

That the purchaser of goods had contracted with the seller to make payment to a third party does not authorize him to make full payment to such third party after receiving notice that the purchase price of part of the goods should be paid to another party, who, as pledgee, had authorized the sale under an agreement to receive the proceeds. *Rice & B. Malting Co. v. International Bank*, 185 Ill. 422. And the delivery of a warehouse receipt by the pledgee to the pledgor, to enable the latter to carry out a contract of sale as the pledgee's agent, does not affect his right to the proceeds of the sale as against the purchaser, where the latter was notified of the pledgee's rights before making payment. *Rice & B. Malting Co. v. International Bank*, supra.

⁹¹ *Baxter v. Sherman*, 73 Minn. 434, 72 Am. St. Rep. 631.

in favor of the third person against a factor, but not against a broker.⁹²

§ 539. Agent's fraud as a defense to third person.

As has been seen in a preceding chapter, a principal is civilly responsible for the fraudulent acts of his agent, while acting within the course of his employment, and the third person may maintain an action against the principal therefor.⁹³ For the same reasons, as there shown, where a principal seeks to enforce a contract entered into by his agent, whether the agency was disclosed or undisclosed at the time of the making of the contract, the third party may set up any defense arising out of the fraudulent acts or misrepresentations made by the agent in the course of his employment, and as an inducement to the contract, to the same extent that he might have set up any defense arising out of such fraudulent acts or misrepresentations had they been made by the principal.⁹⁴ A principal "cannot be permitted to enjoy the fruits of the bargain without adopting all the instrumentalities employed by the agent in bringing it to a consummation. If an agent defrauds the person with whom he is dealing, the principal, not having authorized or participated in the wrong, may, no doubt, rescind, when he discovers the fraud, on the terms of making complete restitution. But so long as he retains the benefits of the dealing, he cannot claim immunity on the ground that the

⁹² See post, chapters 20 and 21.

⁹³ Ante, § 507.

⁹⁴ *Mullens v. Miller*, 22 Ch. Div. 194; *Foster v. Green*, 7 Hurl. & N. 881; *Rockford, R. I. & St. L. R. Co. v. Shunick*, 65 Ill. 223; *Haskit v. Elliott*, 58 Ind. 493; *Brown v. Hartford F. Ins. Co.*, 117 Mass. 479; *Aultman v. Olson*, 34 Minn. 450; *Lawrence v. Hand*, 23 Miss. 103; *Bowers v. Johnson*, 10 Smedes & M. (Miss.) 169; *Elwell v. Chamberlin*, 31 N. Y. 611; *Bennett v. Judson*, 21 N. Y. 238; *Sandford v. Handy*, 23 Wend. (N. Y.) 260; *Mundorff v. Wickersham*, 63 Pa. 89, 3 Am. Rep. 531; *Keough v. Leslie*, 92 Pa. 424; *Union Trust Co. v. Phillips*, 7 S. D. 225; *Crump v. U. S. Min. Co.*, 7 Grat. (Va.) 352, 56 Am. Dec. 116; *Law v. Grant*, 37 Wis. 548; *Kickland v. Menasha Wooden Ware Co.*, 68 Wis. 34, 60 Am. Rep. 831.

fraud was committed by his agent and not by himself."⁹⁵ Thus, in an action by the payee upon an instrument for the payment of money, fraud practiced by the payee's agent, in procuring the instrument to be executed in terms materially different from those in fact agreed to by the maker, is available to the maker as a defense, irrespective of whether, in the particular matters to which the fraud relates, the agent acted under a true or false assumption of authority.⁹⁶ So where a husband, acting as agent for his wife's creditor, procures her signature to a note and mortgage by means of false representations as to the consideration, the wife may set up the failure of consideration as a defense to a suit upon such note and mortgage.⁹⁷

§ 540. Agent's want of authority no defense to third person.

Where a third person deals with an agent or subagent as one having full authority, and certain rights have been acquired by the principal by reason thereof, such third person is estopped to deny the agent's or subagent's authority, where the principal seeks to enforce his rights. Thus, when a principal seeks to enforce a contract that has been made by his agent or subagent, and which has been executed on his part, the third party cannot set up as a defense thereto the fact that such agent or subagent was not authorized to make the contract.⁹⁸ So a mortgagor cannot set up the defense that the mortgagee's agent was not authorized to accept the mortgage, when the mortgagee sues to recover the amount due on the mortgage.⁹⁹ So where one borrows money from another, assuming to act as agent for a third person, he is estopped to deny the authority of the agent to lend, in an action by the principal to recover the loan.¹⁰⁰ By the act

⁹⁵ *Elwell v. Chamberlin*, 31 N. Y. 611, 619; *Bennett v. Judson*, 21 N. Y. 238.

⁹⁶ *Aultman v. Olson*, 34 Minn. 450.

⁹⁷ *Haskit v. Elliott*, 58 Ind. 493.

⁹⁸ *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 2 Colo. 248; *Squier v. Stockton*, 5 La. Ann. 120, 52 Am. Dec. 583; *Mayer v. McLure*, 36 Miss. 389, 72 Am. Dec. 190.

⁹⁹ *Squier v. Stockton*, 5 La. Ann. 120, 52 Am. Dec. 583.

¹⁰⁰ *Union Gold. Min. Co. v. Rocky Mountain Nat. Bank*, 2 Colo. 248.

of borrowing, the borrower concedes the authority of the agent to lend.

§ 541. Suit by principal against agent no defense to suit against third person—When.

Where an undisclosed principal has a right of action against a third person upon a transaction had with such person by his agent, the fact that he brings a suit against his agent on such transaction, under circumstances that do not amount to an election to hold him only responsible, as where he sues the agent under a mistaken understanding caused by the third person, is no defense to a subsequent action against the third person. Thus, where an agent sells goods without disclosing his principal, and the principal understood from the buyer's statements that he had paid the agent therefor, the bringing of suit by the principal against the agent is no defense to a subsequent action against the purchaser.¹⁰¹

§ 542. Principal's right to sue superior to agent's right.

As a general rule, this right of an undisclosed principal to sue on a contract entered into by his agent in his own name is superior to the right of the agent to sue thereon; in other words, although an agent has a right to sue on such a contract, his right to sue is subject to the principal's right to bring an action in his own name; and after he has made his election to sue and has given notice thereof to the other contracting party, or notifies such party of his rights, the agent's right to sue on such contract is thereby destroyed,¹⁰² subject to the modification, however, that if the agent has acquired a lien on or rights in the subject-matter of the contract equal to or greater than the principal's rights, the latter cannot control the action against the third person.¹⁰³

¹⁰¹ *Bertoli v. Smith*, 69 Vt. 425.

¹⁰² *Sadler v. Leigh*, 4 Camp. 195; *Hudson v. Granger*, 5 Barn. & Ald. 27; *Rogers v. Hadley*, 2 Hurl. & C. 227; *Warder v. White*, 14 Ill. App. 50; *Pitts v. Mower*, 18 Me. 361, 36 Am. Dec. 727; *Huntington v. Knox*, 7 Cush. (Mass.) 371; *National L. Ins. Co. v. Allen*, 116 Mass. 398; *McKay v. Draper*, 27 N. Y. 256, 264.

¹⁰³ *Hudson v. Granger*, 5 Barn. & Ald. 27; *Morris v. Cleasby*, 1

III. LIABILITY OF THIRD PERSONS TO PRINCIPAL FOR TORTS.

§ 543. Liability of third person where property is diverted by agent.

Whether a principal can maintain an action for conversion, or replevin, against third persons who have received and refuse to return property diverted by the agent, depends upon the circumstances. He may certainly do so if the third person acted in collusion with the agent, or if he knew that the agent was exceeding his authority, or if he is not in the position of a bona fide purchaser for value. And with certain exceptions, he may do so even as against a bona fide purchaser or pledgee. It is a general principle that a person cannot be deprived of his property without his consent, and that where a person undertakes to sell or pledge property, the purchaser or pledgee, although he may act in good faith and without notice, gets no better title than was possessed by the seller or pledgor—*nemo plus juris ad alium transferre potest quam ipse habet*. This general rule applies, subject to the exceptions hereafter shown, where an agent sells, pledges, or otherwise disposes of his principal's property without authority. If the case does not come within one of the exceptions, the person receiving the property, although he may take it in good faith and for value paid the agent, acquires no title, and if he refuses to return it, the principal may maintain an action against him to recover the property or its value.¹⁰⁴ This is true whether

Maule & S. 576; *Warder v. White*, 14 Ill. App. 50; *Girard v. Taggart*, 5 Serg. & R. (Pa.) 19, 9 Am. Dec. 327.

¹⁰⁴ *Allen v. St. Louis Bank*, 120 U. S. 20; *Warner v. Martin*, 11 How. (U. S.) 209; *Hill v. Coolidge*, 33 Ark. 626; *Thatcher v. Kaucher*, 2 Colo. 698; *Loomis v. Barker*, 69 Ill. 360; *Bertholf v. Quinlan*, 68 Ill. 297; *Thompson v. Barnum*, 49 Iowa, 392; *Levi v. Booth*, 58 Md. 305, 42 Am. Rep. 332; *Gilmore v. Newton*, 9 Allen (Mass.) 171, 85 Am. Dec. 749; *Lime Rock Bank v. Plimpton*, 17 Pick. (Mass.) 159, 28 Am. Dec. 286; *Bercich v. Marye*, 9 Nev. 312; *Holton v. Smith*, 7 N. H. 446; *Burnham v. Holt*, 14 N. H. 367; *Chetwood v. Berrian*, 39 N. J. Eq. 203; *Meiggs v. Meiggs*, 15 Hun (N. Y.) 453; *Saltus v. Everett*, 20 Wend. (N. Y.) 267, 32 Am. Dec. 541; *Manning v. Keenan*, 73 N. Y. 45; *Veislan v. Lewis*, 15 Or. 529, 3 Am. St. Rep. 184; *Barker v. Dinamore*, 72 Pa. 427; *Quinn v. Davis*, 78

the agent disposes of the property as his own or as agent but without authority. And the fact that the agent is liable to the principal, in such cases, for the wrongful diversion of the property, does not prevent the principal from maintaining an action of trover against the person receiving the property from the agent, or release his liability to the principal after a refusal to deliver the property on demand.¹⁰⁵ In order for the principal to maintain an action of trover or conversion in such cases, it is not necessary that he should make a previous demand for the property. If the defendant was rightfully in possession, a demand would be necessary, and he would not be unlawfully detaining it until after a demand therefor, and a refusal on his part to give it up; but where his possession is tortious, that is, where it comes into his possession without the assent express or implied of the owner, or without the assent of some one authorized to act for him, no such demand is necessary,¹⁰⁶ and this same rule has been understood to apply to actions of replevin.¹⁰⁷

Such an action can be maintained, of course, only when the disposal of the property by the agent was unauthorized. It cannot be maintained if the transfer was either within the actual or apparent authority of the agent,¹⁰⁸ or if, though unauthorized, it has since been ratified by the principal.¹⁰⁹ And in order for a third person to claim title through the agent, to the principal's property, he must show that the agent had either actual or apparent authority to so dispose of the property, or that the principal subsequently ratified the agent's unauthorized act in disposing of it.¹¹⁰

Pa. 15; *McMahon v. Sloan*, 12 Pa. 229, 51 Am. Dec. 601; *Sheffer v. Montgomery*, 65 Pa. 329; *Jackson v. Bank*, 92 Tenn. 154, 36 Am. St. Rep. 81; *Stevenson v. Kyle*, 42 W. Va. 229, 57 Am. St. Rep. 354.

¹⁰⁵ *Bertholf v. Quinlan*, 68 Ill. 297.

¹⁰⁶ *Galvin v. Bacon*, 11 Me. 28, 25 Am. Dec. 258; *Gilmore v. Newton*, 9 Allen (Mass.) 171, 85 Am. Dec. 749; *Velsian v. Lewis*, 15 Or. 539, 3 Am. St. Rep. 184. And see cases cited in note 104, *supra*.

¹⁰⁷ *Gates v. Gates*, 15 Mass. 311; *Seaver v. Dingley*, 4 Me. 306; *Velsian v. Lewis*, 15 Or. 539, 3 Am. St. Rep. 184.

¹⁰⁸ See ante, § 236 et seq.

¹⁰⁹ See ante, § 148.

¹¹⁰ *Cole v. Northwestern Bank*, L. R. 10 C. P. 354; *Gerard v.*

It may, at first, seem strange that one who takes possession of goods or chattels under a contract of purchase or pledge, from one who had no right to sell or pledge them, should be treated as a wrongdoer, and an action in tort be maintained against him; but the explanation of the principle lies in the common-law maxim *caveat emptor*, which applies to the transfer of personal property. It is the buyer's own fault, if he is so negligent as not to ascertain the right of the agent to sell, and he cannot successfully invoke his *bona fides* to protect himself from liability to the principal, who can only be divested of his rights or title to his property by his own act, or by the operation of law.¹¹¹

At common law, sales made in market overt were an exception to the above general rule, but the old Saxon institution of market overt has never been recognized in this country, and this exception need not be considered in this connection.¹¹²

§ 544. Applications of this doctrine.

Thus a principal may maintain an action against a third person on notes which his agent, who was authorized to sell property, and take and collect notes, surrenders to such person before they were due, without the consent of his principal, and takes therefor notes of such person payable to himself;¹¹³ or to recover security which his agent has unauthorizedly released or transferred;¹¹⁴ or to recover property seized under an attachment or execution, by a creditor of the agent, where the latter has no interest in such property that is subject to attachment or execution,¹¹⁵ unless the princi-

McCormick, 130 N. Y. 261; *Levi v. Booth*, 58 Md. 305, 42 Am. Rep. 332, 335.

¹¹¹ *Velstan v. Lewis*, 15 Or. 539, 3 Am. St. Rep. 184.

¹¹² *Levi v. Booth*, 58 Md. 305, 42 Am. Rep. 332; *Carmichael v. Buck*, 10 Rich Law (S. C.) 332, 70 Am. Dec. 226; *McMahon v. Sloan*, 12 Pa. 229, 51 Am. Dec. 601. And see other cases cited in preceding note 104.

¹¹³ *Robinson v. Anderson*, 106 Ind. 152.

¹¹⁴ *Whittemore v. Hamilton*, 51 Conn. 153.

¹¹⁵ *Loomis v. Barker*, 69 Ill. 360; *Benner v. Michel*, 23 La. Ann. 489; *Selkirk v. Cobb*, 13 Gray (Mass.) 313; *Farmers' & Mechanics'*

pal's conduct has been such as to estop him from denying the agent's interest in, or ownership of, the property, to the prejudice of such creditor.¹¹⁶ So a principal may recover property or its value from a third person, where his agent, without authority, delivered his principal's property to such person to be held in trust for the principal's children, when it was the principal's intention that such property should be held for his children only in the event of his encountering a threatening pecuniary disaster, and he intended still to retain a power over it.¹¹⁷

So, where it is the authority of an agent to sell, the principal would not be estopped to assert his title against one who had received the property from the agent by some other means, as by mortgage,¹¹⁸ barter,¹¹⁹ or pledge,¹²⁰ or by sale at auction,¹²¹ unless there was other conduct on the part of the principal which induced the third person, acting in good faith, to believe that the agent had authority to dispose of the property in the manner in which he did. And it is immaterial in such cases whether the pledgee or purchaser knew that he was dealing with an agent or not.¹²²

Nat. Bank v. King, 57 Pa. 202, 98 Am. Dec. 215; *Hall v. Williams*, 27 Vt. 405.

¹¹⁶ *Reed v. McIlroy*, 44 Ark. 346; *Benner v. Michel*, 23 La. Ann. 489; *Gumbel v. Koon*, 59 Miss. 264; *Quinn v. Myles*, 59 Miss. 375; *Murne v. Schwabacher*, 2 Wash. T. 191.

¹¹⁷ *Meiggs v. Meiggs*, 15 Hun (N. Y.) 453.

¹¹⁸ *Switzer v. Wilvers*, 24 Kan. 384, 36 Am. Rep. 259; *Macon First Nat. Bank v. Nelson*, 38 Ga. 391. See ante, § 347.

¹¹⁹ *Howard v. Chapman*, 4 Car. & P. 508; *Guerreiro v. Pelle*, 3 Barn. & Ald. 616; *Bertholf v. Quinlan*, 68 Ill. 297; *Lowry v. Beckner*, 5 B. Mon. (Ky.) 41; *Wheeler & W. Mfg. Co. v. Givan*, 65 Mo. 89; *Hayes v. Colby*, 65 N. H. 192; *Taylor & F. Organ Co. v. Starkey*, 59 N. H. 142. See ante, § 347.

¹²⁰ *City Bank v. Barrow*, 5 App. Cas. 664; *Fielding v. Kymer*, 2 Brod. & B. 639; *Warner v. Martin*, 11 How. (U. S.) 209; *Voss v. Robertson*, 46 Ala. 483; *Bott v. McCoy*, 20 Ala. 578, 56 Am. Dec. 223; *Macon First Nat. Bank v. Nelson*, 38 Ga. 391; *Loring v. Brodrie*, 134 Mass. 453; *Wheeler & W. Mfg. Co. v. Givan*, 65 Mo. 89; *Sheffer v. Montgomery*, 65 Pa. 329; *Read v. Cumberland Tel. Co.*, 93 Tenn. 482; *McCreary v. Gaines*, 55 Tex. 485, 40 Am. Rep. 818. And see ante, § 347.

¹²¹ *Towle v. Leavitt*, 23 N. H. 360, 55 Am. Dec. 195.

¹²² *Bott v. McCoy*, 20 Ala. 578, 56 Am. Dec. 223.

This rule also applies where an agent unauthorizedly sells property of his principal, left in his care, in the absence of conduct on the part of the principal amounting to estoppel;¹²³ and in order to maintain an action of trover, in such a case, the principal may show what instructions he gave to his agent at the time the goods were committed to his care.¹²⁴ In such action, evidence tending to prove that the agent sold some of the goods to others, claiming them as his own, is no defense, the question being whether he had authority from the plaintiff to sell.¹²⁵

§ 545. Property diverted by agent in payment of his own debts.

A principal may recover property, or its value, from his agent's creditors, to whom the agent, having a general authority to sell, has transferred it in payment of his own debts,¹²⁶ unless he waives his right to hold the creditor of the agent liable for the value of the property thus received, by ratifying such transaction, with a full knowledge of all the facts, as by receiving from his agent the notes of other parties in payment for the property;¹²⁷ and it is not necessary, in such cases, that the principal should make a previous demand on such third person for his property, in order to maintain an action against him as for trover or conversion.¹²⁸

¹²³ *Thatcher v. Kaucher*, 2 Colo. 698.

¹²⁴ *Thatcher v. Kaucher*, 2 Colo. 698.

¹²⁵ *Thatcher v. Kaucher*, 2 Colo. 698.

¹²⁶ *Martini v. Coles*, 1 Maule & S. 140; *De Bouchout v. Goldsmid*, 5 Ves. 211; *Warner v. Martin*, 11 How. (U. S.) 209; *School Trustees v. McCormick*, 41 Ill. 323; *Thompson v. Barnum*, 49 Iowa, 392; *Parsons v. Webb*, 8 Me. 38, 22 Am. Dec. 220; *Rodick v. Coburn*, 68 Me. 170; *Stanley v. Gaylord*, 1 Cush. (Mass.) 536, 48 Am. Dec. 643; *Benny v. Pegram*, 18 Mo. 191, 59 Am. Dec. 298; *Benny v. Rhodes*, 18 Mo. 147, 59 Am. Dec. 293; *Holton v. Smith*, 7 N. H. 446; *Rice v. Lyndeborough Glass Co.*, 60 N. H. 195; *Gould v. Blodgett*, 61 N. H. 115; *Stewart v. Woodward*, 50 Vt. 78, 28 Am. Rep. 488; *Whitney v. State Bank*, 7 Wis. 620.

¹²⁷ *School Trustees v. McCormick*, 41 Ill. 323; *Benny v. Rhodes*, 18 Mo. 147, 59 Am. Dec. 293.

¹²⁸ *Warner v. Martin*, 11 How. (U. S.) 209; *Galvin v. Bacon*, 11 Me. 28, 25 Am. Dec. 258; *Rodick v. Coburn*, 68 Me. 170; *Gould v. Blodgett*, 61 N. H. 115.

Thus, where a horse is delivered to a special agent for the purpose of sale, and he applies the same to the payment of his own debts, the owner may maintain replevin therefor, although in the hands of a bona fide purchaser.¹²⁹ The fact that a shipping bill in the name of the agent had been forwarded to him by the principal does not estop the latter from recovering his property from one who had received it from the agent in payment of the latter's debt, where such creditor did not know of, and was not induced by, the bill, to thus receive the property.¹³⁰

This rule is subject to the limitation, however, that if the agent has a lien on his principal's property, and the third person takes the property as a security for the agent's debt only to the extent of such lien, before the principal can recover his property from such third person, he must tender the amount of the agent's lien.¹³¹

§ 546. Exceptions to principal's right to recover property diverted.

The doctrine that where an agent disposes of his principal's property without authority, he transfers no title as against the principal, is subject to these exceptions:

(1) It does not apply to currency or negotiable instruments, where they have come into the hands of a bona fide purchaser.

(2) It does not apply where the circumstances are such as to estop the principal.

(3) In some jurisdictions it is rendered inapplicable to some extent by statute, as by the Factors' Acts.

§ 547. Exception in the case of currency and negotiable instruments.

(a) **In general.**—In the first place, the rule that a principal may recover from third persons property diverted by

¹²⁹ *Parsons v. Webb*, 8 Me. 38, 22 Am. Dec. 220.

¹³⁰ *Thompson v. Barnum*, 49 Iowa, 392.

¹³¹ *Warner v. Martin*, 11 How. (U. S.) 225; *Daubigny v. Duval*, 5 Term R. 604; *McCombie v. Davies*, 7 East, 5. And see *Benny v. Rhodes*, 18 Mo. 147, 59 Am. Dec. 293; *Benny v. Pegram*, 18 Mo. 191, 59 Am. Dec. 298.

his agent does not apply to currency or to negotiable instruments which are transferable by delivery. If these are diverted by an agent, and come into the hands of a bona fide purchaser for value, he acquires a good title as against the principal, irrespective of any question of estoppel.¹³² This exception is based on the peculiar necessities of currency and trade, and regulated by decisions and usages peculiar to itself. Thus, where a principal puts a certain sum of money into the hands of an agent in trust, and the agent deposits it in bank with other moneys to his own credit, and afterwards draws out and applies to his own use part of this sum, and then later draws checks for the balance, and for money in another bank, in favor of a third person to secure him against his liability for the agent, on an official bond, the principal cannot, in an action of assumpsit, recover his money from such third person.¹³³ So where an agent, who has collected money belonging to his principal, lends it without authority to certain persons to whom he is personally indebted in an amount larger than the sum loaned, without their having any notice that the money is not his, the principal cannot recover such money from them, even after notice that it did not belong to the agent. For as the money came into their hands lawfully, and it was such property that its trust character could not be readily ascertained or did not show on its face, the borrowers had a legal right to apply it to the payment of their debt, and it could not thereafter be recovered from them by the principal, even after notice that it belonged to him.¹³⁴

(b) **Negotiable instruments.**—In order that this doctrine may apply to negotiable paper, however, the paper must be such that it will pass on delivery, that is, it must be payable to

¹³² *Goodwin v. Robarts*, 1 App. Cas. 476; *London Joint Stock Bank v. Simmons* [1892] App. Cas. 201; *Lime Rock Bank v. Plimpton*, 17 Pick. (Mass.) 159, 28 Am. Dec. 286; *Neely v. Rood*, 54 Mich. 134, 52 Am. Rep. 802; *Burnham v. Holt*, 14 N. H. 367; *Saltus v. Everett*, 20 Wend. (N. Y.) 267, 32 Am. Dec. 541; *Gerard v. McCormick*, 130 N. Y. 261.

¹³³ *Neely v. Rood*, 54 Mich. 134, 52 Am. Rep. 802.

¹³⁴ *Lime Rock Bank v. Plimpton*, 17 Pick. (Mass.) 159, 28 Am. Dec. 286.

bearer or order, or must be indorsed in blank, or in such a way that it may be transferred by delivery only. If it is payable to the order of the principal only, and there is no indorsement, or if though it is payable to order or bearer it bears a restrictive indorsement, its unauthorized transfer by the agent to a third person would confer no title thereto upon the latter, though the agent had possession of the paper at the time of such transfer.¹³⁵ Thus, where a bill of exchange specially indorsed, "Pay C, or order on account of B," was indorsed generally by C, sent to his correspondent, and paid to him by the drawee, and upon the failure of C, the correspondent applied the proceeds of the bill on an indebtedness from C to him, the special indorsement was notice to the correspondent that C held the bill in trust for B, and the latter could recover the proceeds of such bill from the correspondent.¹³⁶ But where there is nothing on the face of the paper to excite suspicion, and the agent appears to have a good title thereto, as by an indorsement in blank, a third party taking such paper from the agent in good faith will be protected in a suit against him by the principal.¹³⁷ The possession of negotiable paper is presumptive proof of property, and he who receives "it in the course of trade for a fair consideration, without any reason for just suspicion, can hold it against the true owner, and recover on it against the drawer, maker, and other parties, even if the paper had been stolen from or lost by the former holder."¹³⁸

(c) **Mala fide holder.**—This exception applies, of course, only in favor of bona fide purchasers. If the person receiv-

¹³⁵ *Whistler v. Forster*, 14 C. B. (N. S.) 248; *Treuttel v. Barandon*, 8 Taunt. 100; *Lancaster Nat. Bank v. Taylor*, 100 Mass. 18, 97 Am. Dec. 70; *Morton v. Preston*, 18 Mich. 60, 100 Am. Dec. 146; *Gibson v. Miller*, 29 Mich. 355, 18 Am. Rep. 98; *McBain v. Seligman*, 58 Mich. 294; *Central Bank v. Hammett*, 50 N. Y. 158; *Hackett v. Reynolds*, 114 Pa. 328; *City Bank of Sherman v. Weiss*, 61 Tex. 331, 60 Am. Rep. 29.

¹³⁶ *Blaine v. Bourne*, 11 R. I. 119, 23 Am. Rep. 429.

¹³⁷ *Morris v. Preston*, 93 Ill. 215, 221; and see cases cited ante, note 135.

¹³⁸ *Saltus v. Everett*, 20 Wend. (N. Y.) 267, 32 Am. Dec. 541, 546.

ing the currency or negotiable instruments acted in collusion with the agent, or if he knew that the agent was committing a breach of trust, the principal may hold him liable, and recover such currency or negotiable paper, in an action of assumpsit, provided it can be ascertained or identified.¹³⁹ Thus a principal may, in an action of assumpsit, recover from a third person money which such person receives from an agent in payment of the agent's debt, knowing that it belongs to the principal.¹⁴⁰ But while in such a case the principal, in order to recover, must show that the creditor knew that the agent was acting in violation of his authority, in so using the money to pay his own debt, knowledge that the money was held by him as agent is sufficient to establish this *prima facie*, as the legal presumption is that an agent has no authority to dispose of the property of the principal in payment of his own debt;¹⁴¹ and one, therefore, who receives such payment, with knowledge that the money was held by his debtor as agent, does so at his peril, and to defeat a recovery must show authority in the agent to so dispose of the money.¹⁴² So, where money is paid by an agent in pursuance of an agreement made by him in his own name, if paid upon a consideration which has failed, it may be recovered by the principal.¹⁴³ A maker of a note, given to a bank, may reclaim from the assignees of such bank, in trust for creditors, money which he had placed in the bank, before the note was due, to be paid to the holder, where the bank appropriated the money and failed to pay the note.¹⁴⁴

¹³⁹ *Clarke v. Shee*, Cowp. 197; *Childers v. Bowen*, 68 Ala. 221; *Shelton v. Carpenter*, 60 Ala. 201; *Merrill v. Norfolk Bank*, 19 Pick. (Mass.) 32; *Dickerson v. Wason*, 47 N. Y. 439, 7 Am. Rep. 455.

¹⁴⁰ *Rusk v. Newell*, 25 Ill. 226; *McBain v. Seligman*, 58 Mich. 295; *Wright v. Cabot*, 89 N. Y. 570; *Baker v. National Exch. Bank*, 16 Abb. N. C. (N. Y.) 458.

¹⁴¹ *Gerard v. McCormick*, 130 N. Y. 261.

¹⁴² *Gerard v. McCormick*, 130 N. Y. 261.

¹⁴³ *Gilpin v. Howell*, 5 Pa. 41, 45 Am. Dec. 720.

¹⁴⁴ *Peak v. Ellicott*, 30 Kan. 156, 46 Am. Rep. 90.

§ 548. Exception based upon estoppel of the principal.

(a) **In general.**—Another exception to the general rule, and which applies to all kinds of property in the hands of an agent, is in cases where the conduct of the principal has been such as to estop him. If the conduct of the principal has been such that a third person, dealing with his agent, has good grounds to believe that the latter is authorized to sell or dispose of the principal's property in the manner in which he does, and in good faith relying upon such authority he pays a consideration for the property, the principal would be estopped to deny the agent's authority in making such sale or other disposal of the property.¹⁴⁵ As has been said: "Where the true owner holds out another, or allows him to appear, as the owner of or as having full power of disposition over the property, and innocent third parties are thus led into dealing with such apparent owner, they will be protected. Their rights in such cases do not depend upon the actual title or authority of the party with whom they deal directly, but are derived from the act of the real owner, which precludes him from disputing, as against them, the existence of the title or power, which through negligence or mistaken confidence, he caused or allowed to appear to be vested in the party making the conveyance."¹⁴⁶

Of course it is essential that the third person acted in

¹⁴⁵ *Gregg v. Wells*, 10 Adol. & E. 90; *Williams v. Pelley*, 96 Ill. App. 346; *Levi v. Booth*, 58 Md. 305, 42 Am. Rep. 332, 335; *Walker v. Detroit Transit R. Co.*, 47 Mich. 338; *Chetwood v. Berriam*, 39 N. J. Eq. 203; *Crocker v. Crocker*, 31 N. Y. 507, 88 Am. Dec. 291; *Porter v. Parks*, 49 N. Y. 564; *Velsian v. Lewis*, 15 Or. 539, 3 Am. St. Rep. 184; *Carmichael v. Buck*, 10 Rich. Law (S. C.) 332, 70 Am. Dec. 226.

¹⁴⁶ *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325, 7 Am. Rep. 341. And see *Saltus v. Everett*, 20 Wend. (N. Y.) 267, 32 Am. Dec. 541.

Lord Ellenborough, in the leading English case of *Pickering v. Busk*, 15 East, 38, says: "Strangers can only look to the acts of the parties, and to the external indicia of property and not to the private communications which may pass between a principal and his broker; and if a person authorize another to assume the apparent right of disposing of property in the ordinary course of trade it must be presumed that the apparent authority is the real authority."

good faith in dealing with the agent and purchasing the property. He cannot take advantage of the doctrine of estoppel, if he has notice, or is put upon inquiry, that the agent is not authorized to sell or dispose of the property, or if he receives the property without giving a consideration therefor, or if he is guilty of colluding with the agent to defraud the principal, or if he has otherwise acted in bad faith in dealing with the agent.¹⁴⁷

(b) **Mere possession of property by agent not sufficient to estop principal.**—The mere fact that a principal has intrusted his agent with possession of his property is not of itself such negligence as to estop him from asserting his title to the property against third persons to whom the agent may sell or pledge the property as his own. "Simply intrusting the possession of a chattel to another as depositor, pledgee or other bailee, or even under a conditional executory contract of sale, is clearly insufficient to preclude the real owner from reclaiming his property, in case of an unauthorized disposition of it by the person so intrusted."¹⁴⁸ Possession of property may be intrusted by one person to another for a great variety of purposes, other than that of sale or disposal, and the mere fact that the person to whom it is so intrusted is the agent of the other does not show that he was to sell or otherwise dispose of it. It may have been intrusted to him as a custodian, or for the purpose of having it delivered or transferred to another, or for many other purposes. Or the agent may have acquired possession of the property unlawfully, or without his principal's knowledge or consent. Hence, if there are no other evidences of authority to sell or dispose of the property than that of mere possession of it, the third person acquiring it from the agent, either by sale or by pledge, will not acquire a good title thereto as

¹⁴⁷ *Porter v. Parks*, 49 N. Y. 564; *Anderson v. Nicholas*, 28 N. Y. 600; *Colonial Bank v. Cady*, 15 App. Cas. 267; *Levi v. Booth*, 58 Md. 305, 42 Am. Rep. 332, 335.

¹⁴⁸ *McNeill v. Tenth Nat. Bank*, 46 N. Y. 325, 7 Am. Rep. 341. And see *Ballard v. Burgett*, 40 N. Y. 314; *Covill v. Hill*, 4 Dento (N. Y.) 323.

against the principal;¹⁴⁹ though the agent is a dealer in that class of property.¹⁵⁰ And the fact that one who intrusts possession and control of personal property to an agent who sells it without authority and without the knowledge of his principal, attempts, after receiving information of the sale, to procure a settlement with the agent for its value, and makes no demand of the buyer therefor until after suit is brought against him, does not estop the principal from asserting his claim against the buyer for its value.¹⁵¹ Thus, if one advances money to another to buy flaxseed for him and to hold it as his agent under an agreement vesting the title at once in the principal, and binding the agent not to buy or sell flaxseed to any one but the principal, a sale by the agent of seed so purchased, without the principal's knowledge, conveys no title, even to an innocent purchaser without notice, though the agent is a dealer in wheat and other grains.¹⁵²

The principal must go further, and do some act of a nature to mislead third persons as to the true position of the title. Several things must concur to create an estoppel, in such cases, by which a principal may be deprived of his property by the act of his agent, without his assent: (1) He must have parted with the possession of his property with intent to pass title to the agent, thus clothing him with the apparent title to, or authority to dispose of, it; (2) a

¹⁴⁹ *Pickering v. Busk*, 15 East, 38; *Brewster v. Sime*, 42 Cal. 147; *Gilman Linseed Oil Co. v. Norton*, 89 Iowa, 434, 48 Am. St. Rep. 400; *Parsons v. Webb*, 8 Me. 38, 22 Am. Dec. 220; *Cooper v. Newman*, 45 N. H. 339; *McNeill v. Tenth Nat. Bank*, 46 N. Y. 325, 7 Am. Rep. 341; *Spraghts v. Hawley*, 39 N. Y. 441, 100 Am. Dec. 452; *Covill v. Hill*, 4 Denio (N. Y.) 323; *Knox v. Eden Musee American Co.*, 148 N. Y. 441, 51 Am. St. Rep. 700; *Edwards v. Dooley*, 120 N. Y. 540; *Velsian v. Lewis*, 15 Or. 539, 3 Am. St. Rep. 184; *McMahon v. Sloan*, 12 Pa. 229, 51 Am. Dec. 601; *Quinn v. Davis*, 78 Pa. 15.

¹⁵⁰ *Gilman Linseed Oil Co. v. Norton*, 89 Iowa, 434, 48 Am. St. Rep. 400; *Quinn v. Davis*, 78 Pa. 15. And see post (d).

¹⁵¹ *Gilman Linseed Oil Co. v. Norton*, 89 Iowa, 434, 48 Am. St. Rep. 400.

¹⁵² *Gilman Linseed Oil Co. v. Norton*, 89 Iowa, 434, 48 Am. St. Rep. 400.

third person must have acquired title from the agent without notice of the defects in his title, or knowledge of circumstances to put him to an inquiry as to the source of his title; and (3) such third person must have parted with value upon the faith of the apparent title of the agent, and his right to dispose of the property.¹⁵³ If any of these elements are lacking and the principal pursues his legal right within the proper time, before the rights of innocent third persons have intervened, he may recover his property.¹⁵⁴ For example, if the agent takes the property from his principal feloniously, or without the principal's consent, the first element would be lacking and the agent could not give a good title to it, even to an innocent purchaser for value.¹⁵⁵

(c) **Possession of indicia of property in addition to possession of property.**—But it is very different where, in addition to possession, the principal clothes the agent with documentary evidence of title to the property, although he may do so without any intention of allowing the agent to dispose of the property. In such a case, the principal is estopped to assert his title as against persons who in good faith purchase or take a pledge of the property from the agent, relying on his apparent title.¹⁵⁶ As was said in a leading New York case:¹⁵⁷ "If the owner intrusts to another, not merely the possession of the property, but also written evidence, over his own signature, of title thereto, and of an unconditional power of disposition over it, the case is vastly different. There can be no occasion for the delivery

¹⁵³ *Barnard v. Campbell*, 55 N. Y. 456, 14 Am. Rep. 289, 58 N. Y. 73, 17 Am. Rep. 208; *Hentz v. Miller*, 94 N. Y. 64.

¹⁵⁴ *Barnard v. Campbell*, 58 N. Y. 73, 17 Am. Rep. 208.

¹⁵⁵ *Barnard v. Campbell*, 55 N. Y. 456, 14 Am. Rep. 289, 58 N. Y. 73, 17 Am. Rep. 208.

¹⁵⁶ *Pickering v. Busk*, 15 East, 38; *Calais Steamboat Co. v. Van Pelt*, 2 Black (U. S.) 372; *Otis v. Gardner*, 105 Ill. 436; *Walker v. Detroit Transit R. Co.*, 47 Mich. 338; *McNeill v. Tenth Nat. Bank*, 46 N. Y. 325, 7 Am. Rep. 341; *Moore v. Metropolitan Nat. Bank*, 55 N. Y. 41, 14 Am. Rep. 173; *Barnard v. Campbell*, 55 N. Y. 456, 14 Am. Rep. 289; *Id.*, 58 N. Y. 73, 17 Am. Rep. 208; *Saltus v. Everett*, 20 Wend. (N. Y.) 267, 32 Am. Dec. 541.

¹⁵⁷ *McNeill v. Tenth Nat. Bank*, 46 N. Y. 325, 7 Am. Rep. 341.

of such documents, unless it is intended that they shall be used, either at the pleasure of the depositary, or under contingencies to arise. If the conditions upon which this apparent right of control is to be exercised are not expressed on the face of the instrument, but remain in confidence between the owner and the depositary, the case cannot be distinguished in principle from that of an agent who receives secret instructions qualifying or restricting an apparently absolute power."

This rule of equitable estoppel only operates to protect those who, in dealing with the agent, exercise ordinary caution and prudence, and who deal in the ordinary way and in the usual course of business, and upon the ordinary evidences of right and authority in those with whom they deal, and as against those who have voluntarily conferred upon others the usual evidences or indicia of ownership of property, or an apparent authority to deal with and dispose of it. In such a case, for obvious reasons, the law raises an equitable estoppel, and as against the real owner, declares that the apparent title and authority which exist by his act or omission shall, as to persons acting and parting with value upon the faith of it, stand for and be regarded as the real title and authority.¹⁵⁸ But, as has been seen above, it is not every parting with the possession of chattels or the documentary evidence of title that will enable the agent to make a good title to one who may purchase from him. "So far as such a parting with the possession is necessary in the business of life, or authorized by the custom of trade, the owner of the goods will not be affected by a sale by the one having the custody and manual possession."¹⁵⁹

This principle has been applied in a great variety of cases. It has been applied, for example, where a merchant allowed goods to stand on the books of a wharfinger in the name of his broker;¹⁶⁰ where the owner of a vessel allowed it to be

¹⁵⁸ *Barnard v. Campbell*, 55 N. Y. 456, 14 Am. Rep. 289, 58 N. Y. 73, 17 Am. Rep. 208.

¹⁵⁹ *Barnard v. Campbell*, 55 N. Y. 456, 14 Am. Rep. 289; *Id.*, 58 N. Y. 73, 17 Am. Rep. 208; *Ballard v. Burgett*, 40 N. Y. 314; *Taylor v. Kymer*, 3 Barn. & Adol. 320; *Dyer v. Pearson*, 3 Barn. & C. 38.

¹⁶⁰ *Pickering v. Busk*, 15 East, 38.

enrolled in the name of his agent as owner;¹⁶¹ where a principal, the owner of bank stock, delivers a certificate thereof, with an indefinite power of disposition, in blank to her agent, who, representing it as his own, transfers the certificate and power to a purchaser in the course of business as payment for a loan;¹⁶² where the owner of a public conveyance allowed the license therefor to be taken out in the name of his agent, when an ordinance required all licenses to be taken out in the name of the owner;¹⁶³ where a principal allowed his agent to take a bill of sale of goods in his own name;¹⁶⁴ where a principal has caused a bill of lading of goods to be made out in his agent's name;¹⁶⁵ but the mere fact that the bill of lading is made out in the agent's name will not estop the principal to recover his property from one who is not induced by, and in fact does not know of, the bill at the time he receives the property from the agent in payment of the latter's own debt.¹⁶⁶

(d) Possession of property by one accustomed to sell similar property as agent.—A principal would also be estopped to assert his title to property against a person who in good faith purchased or took it by pledge from one, to whom he had entrusted its possession, whose usual business it was to sell or deal in property of a similar character, as agent, although it was not the principal's intention that the property should be sold or pledged, when he entrusted its possession to such person.¹⁶⁷ As was said in a leading case on this subject: "If the principal send his commodity to a place, where it is the ordinary business of the person to whom it is confided to sell, it must be intended that the commodity was sent thither for the purpose of sale. If the owner of a horse send it to a repository of sale, can it be

¹⁶¹ *Calais Steamboat Co. v. Van Pelt*, 2 Black (U. S.) 372.

¹⁶² *State Bank v. Cox*, 11 Rich. Eq. (S. C.) 344, 78 Am. Dec. 458.

¹⁶³ *McCauley v. Brown*, 2 Daly (N. Y.) 426.

¹⁶⁴ *Nixon v. Brown*, 57 N. H. 34.

¹⁶⁵ *Saltus v. Everett*, 20 Wend. (N. Y.) 267, 32 Am. Dec. 541.

¹⁶⁶ *Thompson v. Barnum*, 49 Iowa, 392.

¹⁶⁷ *Pickering v. Busk*, 15 East, 38; *Smith v. Clews*, 105 N. Y. 283, 59 Am. Rep. 502.

implied that he sent it thither for any other purpose than that of sale? Or if one send goods to an auction-room, can it be supposed that he sent them thither merely for safe custody? Where the commodity is sent in such a way and to such a place as to exhibit an apparent purpose of sale, the principal will be bound and the purchaser safe."¹⁶⁸ Thus, where a broker made a business of procuring diamonds from large dealers to sell to his customers, and he procured from plaintiffs, dealers in diamonds, some diamonds for a customer, giving a receipt stating that they were received by him on approval to show to his customer, and such customer purchased them from the broker in good faith, supposing him the owner, and the customer had had other like transactions with the broker, the owner was estopped to assert his title to the diamonds as against such customer.¹⁶⁹

But in order that this doctrine may apply, several elements must be present in the case. It is necessary that the agent should have lawfully obtained possession of the property from the principal by the latter's own voluntary act; that it was the usual business of such agent to sell similar property, as agent, and that he should have apparently obtained possession of the property to be dealt with in the line of his business. A principal would not be estopped to assert his title to property against a bona fide purchaser from such an agent, where the latter had tortiously obtained possession of the property from the principal;¹⁷⁰ or where it is not the usual business of the person having possession of the property, to sell such property as agent for others, though it may be his business to sell similar property as owner, and there is no conduct on the part of the principal apparently giving such person ownership or authority to sell or dispose of the property.¹⁷¹ It may be that the person to whom the

¹⁶⁸ *Pickering v. Busk*, 15 East, 38.

¹⁶⁹ *Smith v. Clews*, 105 N. Y. 283, 59 Am. Rep. 502.

¹⁷⁰ *Fitch v. Newberry*, 1 Doug. (Mich.) 1, 40 Am. Dec. 33; *Saltus v. Everett*, 20 Wend. (N. Y.) 366, 32 Am. Dec. 541.

¹⁷¹ *Pickering v. Busk*, 15 East, 38; *Cole v. Northwestern Bank*, L. R. 10 C. P. 354; *Gilman Linseed Oil Co. v. Norton*, 89 Iowa, 434, 48 Am. St. Rep. 400; *Levi v. Booth*, 58 Md. 305, 42 Am. Rep. 332; *Quinn v. Davis*, 78 Pa. 15.

goods are entrusted is a dealer in that class of goods, yet if it does not appear that it is within the line of his business to deal in such goods as agent for others, the mere fact that he has possession of the goods will not estop the owner thereof from reclaiming them from another to whom he has unauthorizedly disposed of them.¹⁷²

As was stated in a Maryland case:¹⁷³ "Independently of the provisions of the statute in regard to the dealings with agents and factors, it is very clear * * * that the bare possession of goods by one, though he may happen to be a dealer in that class of goods, does not clothe him with power to dispose of the goods as though he were the owner, or as having authority as agent to sell or pledge the goods, to the preclusion of the right of the real owner. If he sells as owner there must be some other indicia of property than mere possession. There must be some act or conduct on the part of the real owner whereby the party selling is clothed with the apparent ownership, or authority to sell, and which the real owner will not be heard to deny or question to the prejudice of an innocent third party dealing on the faith of such appearances. If it were otherwise, people would not be secure in sending their watches or articles of jewelry to a jeweler's establishment to be repaired, or cloth to a clothing establishment to be made into garments." Nor is the principal estopped to assert his title against a bona fide purchaser, where the property, entrusted by him to the possession of the agent, is not of a kind similar to that which such agent sells in the line of his business.¹⁷⁴

Thus, a bill of lading fraudulently made, whereby the goods of one person are shipped to or in the name of another, without the consent or knowledge of the former, will not enable the latter to transfer the goods, even to an innocent purchaser for value in the ordinary course of business.¹⁷⁵

¹⁷² *Levi v. Booth*, 58 Md. 305, 42 Am. Rep. 332, 337; *Gilman Linseed Oil Co. v. Norton*, 89 Iowa, 434, 48 Am. St. Rep. 400; *Quinn v. Davis*, 78 Pa. 15.

¹⁷³ *Levi v. Booth*, 58 Md. 305, 42 Am. Rep. 332, 337.

¹⁷⁴ *Pickering v. Busk*, 15 East, 38; *Folsom v. Batchelder*, 22 N. H. 51.

¹⁷⁵ *Saltus v. Everett*, 20 Wend. (N. Y.) 267, 32 Am. Dec. 541.

So where the owner of a diamond ring put it in the hands of a jeweler to match it, or failing in that to get an offer for it, and the jeweler sold it to a third person, the latter got no title thereto, as against the owner, even though they acted in good faith.¹⁷⁶

§ 549. Application of these rules to certificates of stock.

The above rules apply to certificates of stock as well as to other chattels; and a transfer of such certificates, since they are not negotiable instruments, even to a bona fide purchaser or pledgee, by an agent who is unauthorized to make such transfer, gives the transferee no title to the shares as against the true owner thereof, unless the latter is for some reason estopped to assert his title,¹⁷⁷ although the certificates were indorsed in blank by the owner.¹⁷⁸ Thus, a bona fide purchaser or pledgee of such certificates, from an agent, acquires no title thereto as against the principal, where the agent forges the assignment and power of attorney,¹⁷⁹ or where the agent unauthorizedly indorses an assignment on the certificate.¹⁸⁰ Where the owner of stock executes and delivers a power of attorney authorizing the person named therein as attorney to transfer the stock to a person the place for whose name is left blank, with the understanding that it is to be pledged as collateral security to a particular creditor of the person for whose benefit the power of attorney is executed, and the name of such creditor is afterwards inserted in the blank, and the transfer made, the authority of the attorney is exhausted; and when that debt is paid,

¹⁷⁶ *Levi v. Booth*, 58 Md. 305, 42 Am. Rep. 332.

¹⁷⁷ *East Birmingham Land Co. v. Dennis*, 85 Ala. 565, 7 Am. St. Rep. 73; *Taft v. Presidio R. Co.*, 84 Cal. 131, 18 Am. St. Rep. 166; *Shaw v. Spencer*, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115; *Pratt v. Taunton Copper Co.*, 123 Mass. 110, 25 Am. Rep. 37; *Bercich v. Marye*, 9 Nev. 312.

¹⁷⁸ *East Birmingham Land Co. v. Dennis*, 85 Ala. 565, 7 Am. St. Rep. 73.

¹⁷⁹ *Brown v. Howard F. Ins. Co.*, 42 Md. 384, 20 Am. Rep. 90; *Pratt v. Taunton Copper Co.*, 123 Mass. 110, 25 Am. Rep. 37.

¹⁸⁰ *Sewall v. Boston Water Power Co.*, 4 Allen (Mass.) 277, 81 Am. Dec. 701.

the owner of the stock is entitled to its return, notwithstanding the fact that the attorney has transferred it as security for other debts by erasing the name of the creditor first inserted, and inserting another.¹⁸¹

But where the circumstances of the case are such as to create an estoppel, on the part of the principal, to deny such transfer, a bona fide transferee would acquire a good title thereto. If the owner of the shares clothes another with apparent title to the same, or with apparent authority to dispose of or transfer them, he will be estopped to assert his title as against a bona fide purchaser or pledgee from the one whom he has clothed with apparent title or authority.¹⁸² Thus, an agent to whom the owner has delivered a certificate of stock duly indorsed for transfer, with a limited power of disposition for a special purpose, may bind the title thereto as against the true owner by transferring the certificate to a bona fide purchaser or pledgee who has no notice of the limitations of the agent's authority, although the transfer may be made for an unauthorized purpose, and with the intent on the part of the agent to commit a fraud upon the principal.¹⁸³ So where a principal has given his agent written authority to transfer certificates of stock, he will be bound by a transfer to a third person, although the agent violated secret instructions in making the transfer.¹⁸⁴

But the mere fact that the principal has entrusted his agent with possession of the certificates is not sufficient to create an estoppel, if he has not, by assignment or otherwise, clothed him with the apparent title,¹⁸⁵ as where he entrusts him with

¹⁸¹ *Denny v. Lyon*, 38 Pa. 98, 80 Am. Dec. 463.

¹⁸² *Brittan v. Oakland Bank*, 124 Cal. 282, 71 Am. St. Rep. 58; *State Bank v. Cox*, 11 Rich. Eq. (S. C.) 344, 78 Am. Dec. 458; *Otis v. Gardner*, 105 Ill. 436; *Commercial Bank v. Kortright*, 22 Wend. (N. Y.) 348, 34 Am. Dec. 317; *Crocker v. Crocker*, 31 N. Y. 507, 88 Am. Dec. 291.

¹⁸³ *McNeill v. Tenth Nat. Bank*, 46 N. Y. 325, 7 Am. Rep. 341; *Brittan v. Oakland Bank*, 124 Cal. 282, 71 Am. St. Rep. 58; *Ambrose v. Evans*, 66 Cal. 74; *Walker v. Detroit Transit R. Co.*, 47 Mich. 338, and cases cited.

¹⁸⁴ *Commercial Bank v. Kortright*, 22 Wend. (N. Y.) 348, 34 Am. Dec. 317.

¹⁸⁵ *McNeill v. Tenth Nat. Bank*, 46 N. Y. 325, 7 Am. Rep. 341.

the custody of such certificates assigned in blank, without any authority to deal with the same.¹⁸⁶ Neither will the principal be estopped to assert his title to the certificates, if the purchaser or pledgee thereof has actual notice that the agent's apparent title or authority is not real;¹⁸⁷ nor if the form or terms of the indorsement on the certificate or the other circumstances are such as to put the purchaser or pledgee upon inquiry.¹⁸⁸

— **Measure of damages** The measure of damages in an action of trover for the conversion of certificates of stock is the market value of the stock at the date of conversion;¹⁸⁹ but under a statutory action for the return of the property or its value in case a delivery cannot be had, and damages for its detention, upon failure to return the property, the measure of damages is the value of the stock at the day of trial, together with the dividends that have been paid upon it.¹⁹⁰

§ 550. Exception under Factors' Acts.

Exceptions to the general rule that where an agent diverts the property of his principal in breach of trust, purchasers from him acquire no title in the absence of elements of estoppel against the principal, may be made by statute, as by the Factors' Acts in some jurisdictions. In the absence of a statute, if a factor barter or pledges goods consigned to him for sale on commission, the purchaser or pledgee gets no title as against the principal, unless there are elements of estoppel.¹⁹¹ This rule, however, is changed in some jurisdictions by statutes known as Factors' Acts, protecting bona fide purchasers and pledgees from factors.¹⁹²

¹⁸⁶ *Knox v. Eden Musee American Co.*, 148 N. Y. 441, 51 Am. St. Rep. 700.

¹⁸⁷ *Westinghouse v. German Nat. Bank*, 188 Pa. 630.

¹⁸⁸ *Anderson v. Nicholas*, 28 N. Y. 600; *Colonial Bank v. Cady*, 15 App. Cas. 267.

¹⁸⁹ *Bercich v. Marye*, 9 Nev. 312.

¹⁹⁰ *Bercich v. Marye*, 9 Nev. 312.

¹⁹¹ *Allen v. St. Louis Bank*, 120 U. S. 20; *Warner v. Martin*, 11 How. (U. S.) 209. See also ante, § 247 (e).

¹⁹² See post, § 838.

§ 551. Liability of third persons for money won from an agent in gambling.

In those jurisdictions where gambling is made unlawful and the loser is given a right of action against the winner to recover the amount lost, a principal may recover from a third person the amount of his money lost by his agent, to such person, in a gambling or wagering transaction;¹⁹³ and such money may be recovered from the hands of the stakeholder, although the principal had authorized his agent to make the bet.¹⁹⁴ The fact that the winner did not deal with the principal, or was not aware that the money which he won from the agent was the money of the principal, until just before the action, is immaterial. In order to maintain the common count for money had and received, it is not always necessary that there should have been an express privity of contract between the plaintiff and defendant. The basis of this action is that the winner has or receives money which in equity and good conscience belongs to the principal, and the law therefore implies a promise that he will pay it over.¹⁹⁵ Thus, a principal may recover from the proprietor of a gambling house, moneys which he had entrusted to his clerk, who had lost them in such house.¹⁹⁶ So a wife may recover from a third person money which she had entrusted to her husband as her agent to be invested in a certain manner, and which he gambled away to such person.¹⁹⁷

¹⁹³ *Donahoe v. McDonald*, 92 Ky. 123; *Mason v. Waite*, 17 Mass. 560; *Caussidiere v. Beers*, 2 Keyes (N. Y.) 198; *Ruckman v. Pitcher*, 20 N. Y. 9; *Allen v. Watson*, 2 Hill (S. C.) 319; *Burnham v. Fisher*, 25 Vt. 514; *Thompson v. Hynds*, 15 Utah, 389.

¹⁹⁴ *Vischer v. Yates*, 11 Johns. (N. Y.) 23.

Under a statute which gives to the "party aggrieved" the right to recover from the stakeholder any money staked on a bet, one who has acted merely as the agent of another in making the bet and depositing the money cannot maintain the action. The suit must be brought in the name of the principal. *Donahoe v. McDonald*, 92 Ky. 123.

¹⁹⁵ *Caussidiere v. Beers*, 2 Keyes (N. Y.) 198; *Mason v. Waite*, 17 Mass. 560.

¹⁹⁶ *Caussidiere v. Beers*, 2 Keyes (N. Y.) 198.

¹⁹⁷ *Thompson v. Hynds*, 15 Utah, 389.

§ 552. Liability of third persons to principal for fraud in connection with contracts.

If an agent, in dealing with a third person for his principal, is induced to enter into a contract by the fraud of the third person, the fraud, since it is practiced upon the agent while acting for his principal, is practiced upon the principal, and the principal has the same right to avoid the contract, or to maintain an action of deceit, as if he had acted and been deceived personally in the matter.¹⁹⁸ But in order that the principal may maintain an action for fraud committed on his agent, he must show that the latter was acting as his agent in the transaction, or that he ratified his acts therein. He cannot deny the agency and still seek to recover for the fraud.¹⁹⁹ Thus, where an agent purchases goods for his principal, the property, immediately upon the execution of the contract, vests in the principal, and he may maintain an action against the third party for fraudulent representations made to the agent.²⁰⁰

— **Fraud of public officer.** Where a public officer knowingly makes a false record, and a person is injured in a transaction, by reason of the fact that his agent, charged with the whole transaction, is deceived by the record, the law will, in the absence of any evidence to the contrary, treat the principal as deceived, and allow him to recover his damages in an action upon the official bond of the officer.²⁰¹

§ 553. Liability of third persons for fraud in collusion with agent.

It sometimes happens that a third person and an agent conspire to practice a fraud upon the principal, and in such a case the principal may maintain an action against either

¹⁹⁸ *Borough of Salford v. Lever* [1891] 1 Q. B. 168; *Smith v. Sorby*, 3 Q. B. Div. 552; *Cushing v. Rice*, 46 Me. 303, 71 Am. Dec. 579; *Boston v. Simmons*, 150 Mass. 461, 15 Am. St. Rep. 230; *United States Mortg. & Trust Co. v. Crutcher*, 169 Mo. 444; *Beebe v. Robert*, 12 Wend. (N. Y.) 431, 27 Am. Dec. 132.

¹⁹⁹ *United States Mortg. & Trust Co. v. Crutcher*, 169 Mo. 444.

²⁰⁰ *Cushing v. Rice*, 46 Me. 303, 71 Am. Dec. 579.

²⁰¹ *Perkins v. Evans*, 61 Iowa, 35.

or both to recover damages for the conspiracy and fraud.²⁰² And the fact that the principal has brought an action and recovered against the agent for his fraud as agent does not prevent a subsequent recovery against the third person for his fraud, because these are separate causes of action.²⁰³ Thus in a leading English case, where an agent authorized to buy coals for his principal, conspired with a certain coal dealer to charge the principal a certain extra price for the coal in addition to the price charged by the dealer, which additional price was to be turned over to the agent for giving the contract to such dealer, and the principal recovered from his agent such additional price, in an action for money had and received, the coal dealer could not set up this recovery against the agent as a defense to an action against him to recover the extra price paid.²⁰⁴

As was said by Lord Esher in this case: "If an agent takes a bribe from a third person, whether he calls it a commission or by any other name, for the performance of a duty which he is bound to perform for his principal, he must give up to his principal whatever he has by reason of the fraud, received beyond his due. It is a separate and distinct fraud of the agent. * * * It signifies not what it may be called, whether damages or money had and received, the foundation of the claim of the principal is, that there is a separate and distinct fraud by his agent upon him, and therefore he is entitled to recover from the agent the sum which he has received. But does this prevent the principal from suing the third person also if he has been fraudulent, because of his fraud? It has been settled that, if the principal brings an action against the third person first, he cannot set up the defense that the action cannot be maintained against him because the thing was done through the agent, and the principal was entitled to sue the agent. What

²⁰² *Borough of Salford v. Lever* [1891] 1 Q. B. 168; *Boston v. Simons*, 150 Mass. 461, 15 Am. St. Rep. 230; *Atlee v. Fink*, 75 Mo. 100, 42 Am. Rep. 385; *United States Mortg. & Trust Co. v. Crutcher*, 169 Mo. 444.

²⁰³ *Glaspie v. Keator*, 5 C. C. A. 474, 56 Fed. 203.

²⁰⁴ *Borough of Salford v. Lever* [1891] 1 Q. B. 168.

difference can it make that the principal sues the third party secondly instead of first? The agent has been guilty of two distinct and independent frauds,—the one in his character of agent, the other by reason of his conspiracy with the third person with whom he has been dealing. Whether the action by the principal against the third person was the first or the second must be wholly immaterial. The third person was bound to pay back the extra price which he had received, and he could not absolve himself or diminish the damages by reason of the principal having recovered from the agent the bribe which he had received.”²⁰⁵

But since the agent and the third person are joint tortfeasors, if the principal releases the agent from the effect of his fraud, he cannot afterwards bring a suit against the third person.²⁰⁶ Any other agreement, however, between principal and agent that does not amount to a release of the agent, will not prevent an action against the third person for his fraud, as where the principal agrees to postpone his action against the agent until after he has brought his action against the third person.²⁰⁷

— **Where agent secretly acts for opposite party in the same transaction.** This question perhaps most frequently arises in cases where an agent, employed by a certain principal, secretly acts for the opposite party in the same transaction. The liability of an agent to his principal, where he secretly acts for an opposite party in a transaction with his principal, has been considered in a preceding chapter.²⁰⁸ As was there shown, such acts are a fraud upon the principal, and the third party by secretly employing or acting with the agent, knowing that he was at the same time acting for the other party, is a party to the fraud, for which he may be held liable. The principal's rights in such a case depend upon the state of the transaction at the time he discovers the fraud and acts thereon. If the contract is wholly executory and has been entered into by means of fraud between the

²⁰⁵ *Borough of Salford v. Lever* [1891] 1 Q. B. 168.

²⁰⁶ *Borough of Salford v. Lever* [1891] 1 Q. B. 168.

²⁰⁷ *Borough of Salford v. Lever* [1891] 1 Q. B. 168.

²⁰⁸ See ante, § 414.

agent and third person, it is not binding upon the principal and he may repudiate it when he discovers the fraud.²⁰⁹ If it is executed wholly or in part, and the rights of innocent third persons have not intervened, he may rescind the contract, and, upon restoring whatever he has received under it, recover back the rights or property he has parted with under the contract,²¹⁰ even though the agent does not act corruptly, or there is no actual intention to defraud the principal. Or if he so elects, he may allow the contract to stand and bring an action against the third party for damages resulting from his fraud.²¹¹

Thus, where an agent employed to sell property sells the same to a purchaser for whom he is acting as agent in effecting the purchase, the seller may in equity avoid the contract.²¹² So where a purchaser from an agent allows the latter to acquire an interest in the purchase in violation of his contract with his principal, he is not a bona fide purchaser, so as to entitle him to protection against the right of the principal to set the sale aside.²¹³

§ 554. Third person is not liable for fraud or neglect of agent unless a party thereto.

It follows from the rule stated in the preceding section that a third person is not liable for the fraud or neglect of an agent, whereby the latter's principal suffers an injury, unless he has been a party to, or in some way participated

²⁰⁹ *Fish v. Leser*, 69 Ill. 394; *Lewis v. Hillman*, 3 H. L. Cas. 607; *New York Cent. Ins. Co. v. National Protection Ins. Co.*, 14 N. Y. 85.

²¹⁰ *Panama & S. P. Tel. Co. v. India Rubber, G. P. & Tel. Works Co.*, 10 Ch. App. 515; *City of Findlay v. Pertz*, 66 Fed. 427; *Miller v. Louisville & N. R. Co.*, 83 Ala. 274, 3 Am. St. Rep. 722; *Norris v. Tayloe*, 49 Ill. 17, 95 Am. Dec. 568; *Eldridge v. Walker*, 60 Ill. 230; *Louisville Bank v. Gray*, 84 Ky. 566; *Hegenmyer v. Marks*, 37 Minn. 6, 5 Am. St. Rep. 808; *Gardner v. Ogden*, 22 N. Y. 327, 78 Am. Dec. 192; *Greene v. Haskell*, 5 R. I. 447.

²¹¹ *Glaspie v. Keator*, 5 C. C. A. 474, 56 Fed. 203.

²¹² *Fish v. Leser*, 69 Ill. 394.

²¹³ *Miller v. Louisville & N. R. Co.*, 83 Ala. 274, 3 Am. St. Rep. 722.

in, the commission of such fraud or negligence.²¹⁴ Thus, where an agent under a valid power sells and indorses negotiable paper in fraud of the rights of his principal, to bona fide purchasers, for a valuable consideration paid without notice that the agent is acting fraudulently toward his principal, and there is nothing on the face of the papers, or in circumstances of the case, to put them upon inquiry, the purchasers will acquire a title free from all equities existing between the principal and agent.²¹⁵ So where a mortgagee pays over money to an agent, authorized to negotiate the loan, upon delivery by him of the note and mortgage, the payment to the agent is a payment to the principal, and the mortgagee is not liable for a failure of the agent to pay the money over to his principal.²¹⁶

§ 555. Liability of third persons for interference with agency, or injuries to agent, etc.

If a third person unlawfully interferes with an agent and thereby prevents him from performing his duties to the principal, the latter may maintain an action on the case against him to recover the damages he has sustained,²¹⁷ and if there is an element of malice in the defendant's action in enticing away the agent, he may be held liable in exemplary damages.²¹⁸ A third person will be liable in damages to a principal if he unlawfully induces or causes his agent to break his contract and refuse to perform the services which he has undertaken;²¹⁹ and the fact that the contract of

²¹⁴ *Bacon v. Markley*, 46 Ind. 116; *Mason v. Bauman*, 62 Ill. 76; *National Mortg. & Debenture Co. v. Lash*, 5 Kan. App. 633.

²¹⁵ *Mason v. Bauman*, 62 Ill. 76.

²¹⁶ *National Mortg. & Debenture Co. v. Lash*, 5 Kan. App. 633.

²¹⁷ *Lumley v. Gye*, 2 El. & Bl. 216; *Temperton v. Russell* [1893] 1 Q. B. 435; *Doremus v. Hennessy*, 176 Ill. 608, 68 Am. St. Rep. 203; *Perkins v. Pendleton*, 90 Me. 166, 60 Am. St. Rep. 252; *Walker v. Cronin*, 107 Mass. 555; *Haskins v. Royster*, 70 N. C. 601, 16 Am. Rep. 780; *St. Johnsbury & L. C. R. Co. v. Hunt*, 55 Vt. 570, 45 Am. Rep. 639.

²¹⁸ *Bixby v. Dunlap*, 56 N. H. 456, 22 Am. Rep. 475.

²¹⁹ *Lumley v. Gye*, 2 El. & Bl. 216; *Hart v. Aldridge*, Cowp. 54; *Salter v. Howard*, 43 Ga. 601; *Jones v. Blocker*, 43 Ga. 331; *Dore-*

service between the principal and agent was an unreasonable one is no defense to the defendant in such an action.²²⁰

In a Kentucky case it was held that a statute, providing for a certain fine and penalty against any person who shall willfully entice, persuade, or otherwise influence any person or persons who have contracted to labor for a fixed period of time to abandon such contract before such period of service shall have expired, without the consent of the employer, is intended to apply, principally, to farm laborers, and should not be construed so as to cover contracts for the performance of dramatic artists; and that inducing a person to break his contract with the plaintiff is not in itself an actionable wrong, and the mere fact that the defendant was actuated by malicious motives and by a purpose of injuring the plaintiff will not so change the character of what he has done as to convert it into a tort for which damages can be recovered.²²¹

A principal may maintain an action against a third person who by an assault or negligence causes injuries to his agent, and disables him from performing the services which he has undertaken.²²² So a third person may be held liable in damages for maliciously causing the arrest of an engineer while running a train, with intent to delay the train and injure the company.²²³

§ 556. Liability of third persons for injury to property in agent's possession.

Upon the ground that possession of the agent is considered the possession of his principal, a principal may maintain an

mus v. Hennessy, 176 Ill. 608, 68 Am. St. Rep. 203; *Walker v. Cronin*, 107 Mass. 555; *Bixby v. Dunlap*, 56 N. H. 456, 22 Am. Rep. 475; *Noice v. Brown*, 39 N. J. Law, 569; *Haskins v. Royster*, 70 N. C. 601, 16 Am. Rep. 780; *Daniel v. Swearengen*, 6 S. C. 297, 24 Am. Rep. 471; *Huff v. Watkins*, 15 S. C. 82, 40 Am. Rep. 680; *St. Johnsbury & L. C. R. Co. v. Hunt*, 55 Vt. 570, 45 Am. Rep. 639.

²²⁰ *Haskins v. Royster*, 70 N. C. 601, 16 Am. Rep. 780.

²²¹ *Bourlier v. Macauley*, 91 Ky. 135, 34 Am. St. Rep. 171.

²²² *Ames v. Union R. Co.*, 117 Mass. 541, 19 Am. Rep. 426; *Woodward v. Washburn*, 3 Denio (N. Y.) 369.

²²³ *St. Johnsbury & L. C. R. Co. v. Hunt*, 55 Vt. 570, 45 Am. Rep. 639.

action against a third person for any injury to, or conversion of, his property while in the agent's possession,²²⁴ though in such a case the agent also may maintain an action against the wrongdoer.²²⁵ If, however, the contract between the principal and agent gives the property into the possession of the latter for a specified time, the principal could not maintain an action for the conversion of the goods by a third person, during the continuance of such contract,²²⁶ for in order to maintain such an action the plaintiff must show that he has either a general or special property in the thing converted, and the right to its possession.²²⁷

Thus, one whose property has been replevied by a writ against his agent can retake it by replevin from the plaintiff in the first action, even during the pendency of that action.²²⁸ For "as a general principle, the owner of a chattel may retake it by replevin from any person whose possession is unlawful, unless it is in the custody of the law, or unless it has been taken by replevin from him by the party in possession."²²⁹ So the owner of goods consigned to an agent who has a lien thereon for a balance due him from the owner, may maintain trespass against the officer who attaches the goods as the property of the agent.²³⁰ But where a principal intrusts money to his agent to carry, and the latter while a passenger on a railroad is killed, and the money which was on the agent's person, without notice to the railroad company, is destroyed by the company's negligence, the latter will not be liable for the loss.²³¹

²²⁴ *Manders v. Williams*, 4 Exch. 339; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. (U. S.) 344; *White v. Dolliver*, 113 Mass. 400, 18 Am. Rep. 502; *Holly v. Huggeford*, 8 Pick. (Mass.) 73, 19 Am. Dec. 303; *Thorp v. Burling*, 11 Johns. (N. Y.) 285; *Waldo v. Peck*, 7 Vt. 434.

²²⁵ *Post*, § 627.

²²⁶ See *Soper v. Sumner*, 5 Vt. 274.

²²⁷ *Bertholf v. Quinlan*, 68 Ill. 297.

²²⁸ *White v. Dolliver*, 113 Mass. 400, 18 Am. Rep. 502.

²²⁹ *Ilisley v. Stubbs*, 5 Mass. 280.

²³⁰ *Holly v. Huggeford*, 8 Pick. (Mass.) 73, 19 Am. Dec. 303. And see *Manders v. Williams*, 4 Exch. 339.

²³¹ *First Nat. Bank of Greenfield v. Marletta & C. R. Co.*, 20 Ohio St. 259, 5 Am. Rep. 655.

If an agent in dealing with his principal's property, also deals with property of his own in the same transaction, and an injury is done, by a third person, to the property of both while together, the principal may maintain a separate action for the injury to his part of the property. Thus, where an agent ships certain property, a portion of which belongs to him, and a portion to his undisclosed principal, and the property is injured through the negligence of the railroad company, the principal may maintain a separate action for the injury to his portion of the property,²⁸² though he cannot maintain a separate action on the contract of transportation.²⁸³

§ 557. Liability of third persons for property of principal taken on a judgment against agent alone.

A judgment against an agent, in an action against him, to which the principal is not made a party, and he does not see fit to intervene and appear therein, does not settle the rights of the principal as to the property involved in such judgment;²⁸⁴ and if his property has been replevied by a writ against his agent, he can retake it by replevin from the party who has taken it from the agent, nor need he wait until the first suit is determined.²⁸⁵ While the property was in the hands of the sheriff, executing the writ of replevin against the agent, and he was actually engaged in transferring it to the possession of the person causing such writ to be issued, it was in custodia legis, and the officer could not be disturbed while making the transfer; but that transfer having been completed, it was in the custody of the person replevying it, and the principal could maintain his writ of replevin against him to retake it.²⁸⁶ So trespass will lie for the taking and carrying away of the

²⁸² St. Louis, K. C. & N. R. Co. v. Thacher, 13 Kan. 564.

²⁸³ See ante, § 548.

²⁸⁴ White v. Dolliver, 113 Mass. 400, 18 Am. Rep. 502, 508. Nor does it make any difference that in such suit the principal was the agent's attorney. Warner v. Comstock, 55 Mich. 615.

²⁸⁵ White v. Dolliver, 113 Mass. 400, 18 Am. Rep. 502, 508.

²⁸⁶ White v. Dolliver, 113 Mass. 400, 18 Am. Rep. 502.

goods bought on the premises of a nonresident landowner at a constable's sale on a judgment and execution of a justice of the peace against another as his agent for the direction and management of the farm.²³⁷

IV. EQUITABLE REMEDIES OF PRINCIPAL; FOLLOWING TRUST FUNDS OR PROPERTY.

§ 558. General doctrine as to following trust funds or property.

As was stated in a former chapter, a principal may not only recover from the agent himself property or funds received by the agent by virtue of the agency, but he may also, subject to limitations, follow the same in equity into the hands of a third person.²³⁸ It is a well settled principle of equity jurisprudence that trust funds or property, or the proceeds of such property, may be followed and recovered in equity, so long as they can be identified, until they have come into the hands of a third person having an equitable right to the same superior to that of the owner. This rule applies with full force to property or funds in the hands of an agent impressed with a trust in favor of his principal. Such funds or property, or the proceeds of such property, may be followed in equity and recovered by the principal so long as they can be identified, in the hands of any person who does not occupy such a position as gives him an equitable right to the same superior to the rights of the principal.²³⁹ And it is

²³⁷ *Coe v. English*, 6 *Houst. (Del.)* 562.

²³⁸ *Ante*, § 429.

²³⁹ *Knatchbull v. Hallett*, 13 *Ch. Div.* 696; *Whitecomb v. Jacob*, 1 *Salk.* 160; *Pennell v. Deffell*, 4 *De Gex, M. & G.* 372; *Central Nat. Bank v. Conn. Mut. L. Ins. Co.*, 104 *U. S.* 54; *Union Stock Yards Nat. Bank v. Gillespie*, 137 *U. S.* 411; *Lehman v. Lewis*, 62 *Ala.* 129; *Preston v. McMillan*, 58 *Ala.* 84; *Hill v. Coolidge*, 33 *Ark.* 621; *Haines v. Haines*, 54 *Ill.* 74; *Drovers' Nat. Bank of Union Stock Yards v. O'Hare*, 18 *Ill. App.* 182; *Riehl v. Evansville Foundry Ass'n*, 104 *Ind.* 70; *Pearce v. Dill*, 149 *Ind.* 136; *Peak v. Ellicott*, 30 *Kan.* 156, 46 *Am. Rep.* 90; *Succession of Boisblanc*, 32 *La. Ann.* 109; *Neely v. Rood*, 54 *Mich.* 134, 52 *Am. Rep.* 802; *Third Nat. Bank of St. Paul v. Stillwater Gas Co.*, 36 *Minn.* 75; *Twohy Mercantile Co. v. Melbye*, 78 *Minn.* 357; *Richardson v. St. Louis Nat. Bank*,

no answer to the principal's claim to a trust fund that the other has promised to pay it to the agent.²⁴⁰ Equity "will follow the fund through any number of transmutations and preserve it for the owner as long as it can be identified."²⁴¹ "It is wholly immaterial whether the property be in its original state, or has been converted into money, securities, negotiable instruments, or other property, if it be distinguishable and separable from other property or assets, and has an earmark, or other appropriate identity. * * * The product, or substitute of the original thing, has the nature of the original thing itself imparted to it, as long as it can be ascertained to be such product, or substitute; and the right of the principal thereto ceases only when the means of ascertainment fails."²⁴²

This rule is based upon the equitable doctrine relating to constructive trusts, which arise whenever a person has come

10 Mo. App. 246; *Van Alen v. American Nat. Bank*, 52 N. Y. 1; *Baker v. New York Nat. Bank*, 100 N. Y. 31, 53 Am. Rep. 150; *Roca v. Byrne*, 145 N. Y. 182, 45 Am. St. Rep. 599; *Whitley v. Foy*, 59 N. C. (6 Jones' Eq.) 34, 78 Am. Dec. 236; *Farmers' & M. Nat. Bank v. King*, 57 Pa. 202, 98 Am. Dec. 215; *Frazier v. Erie City Bank*, 8 Watts & S. (Pa.) 18; *Greene v. Haskell*, 5 R. I. 447; *Overseers of Poor v. Virginia Bank*, 2 Grat. (Va.) 544, 44 Am. Dec. 399; *Stevenson v. Kyle*, 42 W. Va. 229, 57 Am. St. Rep. 854; *McLeod v. Evans*, 66 Wis. 401, 57 Am. Rep. 287.

Where an agent lends his principal's money, taking a promissory note, payable to himself, the note belongs to the principal, and the borrower may not pay the agent after he has been informed of his principal's superior right, and has received notice not to pay the agent. *Farmers' & M. Nat. Bank v. King*, 57 Pa. 202, 98 Am. Dec. 215. A principal may recover an order, received by his agent in payment of goods sold by him, from the acceptor of such order, although the latter had accepted because the agent owed him, and in the belief that he could satisfy the order by giving credit to the agent for the amount thereof. *Stevenson v. Kyle*, 42 W. Va. 229, 57 Am. St. Rep. 854.

²⁴⁰ *Farmers' & M. Nat. Bank v. King*, 57 Pa. 202, 98 Am. Dec. 215.

²⁴¹ *Farmers' & M. Nat. Bank v. King*, 57 Pa. 202, 98 Am. Dec. 215; *Third Nat. Bank of St. Paul v. Stillwater Gas Co.*, 36 Minn. 75.

²⁴² *Overseers of Poor v. Virginia Bank*, 2 Grat. (Va.) 544, 44 Am. Dec. 399. And see *Twohy Mercantile Co. v. Melbye*, 78 Minn. 357; *Pearce v. Dill*, 149 Ind. 136, 142.

into the possession of money or property which equitably belongs to another and to which he has not a superior equitable right or title.²⁴³ And when he identifies his fund or property, he has a right to have it restored to him, not as a debt due and owing to him, but for the reason that it is his property, wrongfully diverted and withheld.²⁴⁴

— **Purchasers not bona fide.** A principal may clearly assert his right to follow the trust funds or property as against persons who are not in the position of bona fide purchasers, and a person is not a bona fide purchaser if he takes the property or funds with notice that they belong to the principal.²⁴⁵ If, therefore, an agent deposits funds of his principal in a bank, and the bank, through the knowledge of its officers, has notice that the funds belong to the principal, the bank will be held as trustee for the principal, and cannot assert as against the fund a lien or right of set-off existing in his favor against the agent.²⁴⁶ So, where an agent embezzled funds belonging to his principal, and with them bought real estate, causing the title to be made to his wife, and she had notice of his fraudulent appropriation of his principal's money, she was held to be a trustee of such property for her husband's principal.²⁴⁷ But "to charge a stranger to a trust fund as a trustee, by reason of participa-

²⁴³ 2 Pomeroy, Eq. Jur. § 1047.

²⁴⁴ Pearce v. Dill, 149 Ind. 136.

²⁴⁵ Jaudon v. National City Bank, 8 Blatchf. 430, Fed. Cas. No. 7,230; Fifth Nat. Bank v. Hyde Park, 101 Ill. 595, 40 Am. Rep. 218; Riehl v. Evansville Foundry Ass'n, 104 Ind. 70; Van Alen v. American Nat. Bank, 52 N. Y. 1; Farmers' & M. Nat. Bank v. King, 57 Pa. 202, 98 Am. Dec. 215.

²⁴⁶ Central Nat. Bank v. Conn. Mut. L. Ins. Co., 104 U. S. 54; Union Stock Yards Nat. Bank v. Gillespie, 137 U. S. 411; Pearce v. Dill, 149 Ind. 136; Third Nat. Bank of St. Paul v. Stillwater Gas Co., 36 Minn. 75; Importers' & T. Nat. Bank v. Peters, 123 N. Y. 272; Baker v. New York Nat. Bank, 100 N. Y. 31, 53 Am. Rep. 150; Whitley v. Foy, 59 N. C. (6 Jones' Eq.) 34, 78 Am. Dec. 236; Farmers' & M. Nat. Bank v. King, 57 Pa. 202, 98 Am. Dec. 215; Continental Nat. Bank v. Weems, 69 Tex. 489, 5 Am. St. Rep. 85; Overseers of Poor v. Virginia Bank, 2 Grat. (Va.) 544, 44 Am. Dec. 399.

²⁴⁷ Riehl v. Evansville Foundry Ass'n, 104 Ind. 70.

tion in a misapplication of the fund, upon the ground that the fund was used in payment of a private debt of the original trustee, it is necessary to show not only that the party sought to be charged was aware that the fund was a trust fund, but also that he was aware that the debt to the payment of which it was applied was at the time of such application in fact a private debt—a debt of such a character that the fund in question could not lawfully be applied in payment thereof.”²⁴⁸

— **No consideration.** A principal may also assert his equitable right as against third persons who receive the property or funds without notice of their trust character if they do not part with any consideration, for they are not in the position of bona fide purchasers for value. Thus, the right may be asserted as against a mere donee of the trust funds or of property purchased with the same,²⁴⁹ or as against attaching, execution, or other creditors of the agent,²⁵⁰ or as against the agent’s assignee in trust for creditors,²⁵¹ or against the agent’s trustee or assignee in bankruptcy,²⁵² or against the legal representatives of a deceased agent.²⁵³

— **Identification.** As to what will constitute sufficient identification of trust funds or property, where their original

²⁴⁸ *Fifth Nat. Bank v. Hyde Park*, 101 Ill. 595, 40 Am. Rep. 218.

²⁴⁹ *Riehl v. Evansville Foundry Ass’n*, 104 Ind. 70; *Fifth Nat. Bank v. Hyde Park*, 101 Ill. 595, 40 Am. Rep. 218.

²⁵⁰ *Farmers’ & M. Nat. Bank v. King*, 57 Pa. 202, 98 Am. Dec. 215; *Roca v. Byrne*, 145 N. Y. 182, 45 Am. St. Rep. 599; *Greene v. Haskell*, 5 R. I. 447; *Stevenson v. Kyle*, 42 W. Va. 229, 57 Am. St. Rep. 854.

²⁵¹ *Peak v. Ellicott*, 30 Kan. 156, 46 Am. Rep. 90; *Chesterfield Mfg. Co. v. Dehon*, 5 Pick. (Mass.) 7, 16 Am. Dec. 367; *Harrison v. Smith*, 83 Mo. 210, 53 Am. Rep. 571; *McLeod v. Evans*, 66 Wis. 401, 57 Am. Rep. 287; *Davenport Plow Co. v. Lamp*, 80 Iowa, 722, 20 Am. St. Rep. 442.

²⁵² *Knatchbull v. Hallett*, 13 Ch. Div. 696; *Taylor v. Plumer*, 3 Maule & S. 562; *Whitecomb v. Jacob*, 1 Salk. 160; *Thompson v. Perkins*, 3 Mason, 232, Fed. Cas. No. 13,972; *Stoller v. Coates*, 88 Mo. 514; *Thompson v. Gloucester City Sav. Inst. (N. J. Eq.)* 8 Atl. 97; *Duguid v. Edwards*, 50 Barb. (N. Y.) 297; *Continental Nat. Bank v. Weems*, 69 Tex. 489, 5 Am. St. Rep. 85.

²⁵³ *Succession of Boisblanc*, 32 La. Ann. 109.

shape has been changed or they have been confused with other goods, so as to permit the principal to recover them or their product from the possession of a third person not a bona fide holder for value, the authorities are not entirely in harmony. It has been held that if the fund has been confused with other funds so that it could not be distinguished from the latter, this equitable remedy would be lost and the principal could not recover them.²⁵⁴ And again it has been held that the trust fund or property must be clearly traced into other specific property in order that the cestui que trust may claim either the fund or property itself or a lien upon it.²⁵⁵ But by the weight of authority, identification will be sufficient to support at least a lien in favor of the principal, if the particular property or fund can be traced into the estate of the trustee, although it may be impossible to point out the specific property in which the trust property or fund has been invested.²⁵⁶ All that the law contemplates by requiring the property or fund to be identified is a substantial identification, and in case the fund consists of money, the principal may reclaim it, although not able to trace the identical coins or bills, so long as its identity as a fund can be ascertained.²⁵⁷

§ 559. Effect of commingling of funds or property.

If trust funds or property which have been diverted by an agent, and have come into the hands of a third person with notice of the trust, have become so commingled with other property or funds of such person that they cannot be

²⁵⁴ Taylor v. Plumer, 3 Maule & S. 562, 575. See post, § 559.

²⁵⁵ Continental Nat. Bank v. Weems, 69 Tex. 489, 5 Am. St. Rep. 85. See post, § 559.

²⁵⁶ Frith v. Cartland, 2 Hem. & M. 417, 34 Law J. Ch. 301; Knatchbull v. Hallett, 13 Ch. Div. 696; Central Nat. Bank v. Conn. Mut. L. Ins. Co., 104 U. S. 54; Frelinghuysen v. Nugent, 36 Fed. 229; Peak v. Elllicott, 30 Kan. 156, 46 Am. Rep. 90; Pundmann v. Schoenich, 144 Mo. 149; Van Alen v. American Nat. Bank, 52 N. Y. 1; Cavin v. Gleason, 105 N. Y. 256; Farmers' & M. Nat. Bank v. King, 57 Pa. 202, 89 Am. Dec. 215; McLeod v. Evans, 66 Wis. 409, 57 Am. Rep. 287; Bowers v. Evans, 71 Wis. 133.

²⁵⁷ Pearce v. Dill, 149 Ind. 136.

identified, and separated, the whole mass will be impressed with a trust in favor of the principal, to the extent of the trust funds or property.²⁵⁸ And if the principal can trace his fund or property into the estate of the trustee, and show that it was used to increase that estate, though he cannot point out the specific property in which it is invested, his charge upon such estate, to the extent of such trust fund or property, is superior to that of general creditors of the estate.²⁵⁹ "If it appears that trust property has been wrongfully converted by the trustee, and constitutes, although in a changed form, a part of the assets, it would seem to be equitable, and in accordance with equitable principles, that the things into which the trust property has been changed should, if required, be set apart for the trust, or if separa-

²⁵⁸ *Frith v. Cartland*, 2 Hem. & M. 417; *Knatchbull v. Hallett*, 13 Ch. Div. 696; *Metropolitan Nat. Bank v. Campbell Commission Co.*, 77 Fed. 705; *Frelinghuysen v. Nugent*, 36 Fed. 229; *Central Nat. Bank v. Conn. Mut. L. Ins. Co.*, 104 U. S. 54; *Peak v. Ellicott*, 30 Kan. 156, 46 Am. Rep. 90; *Van Alen v. American Nat. Bank*, 52 N. Y. 1; *Farmers' & M. Nat. Bank v. King*, 57 Pa. 202, 98 Am. Dec. 215.

Where a factor keeps the funds arising from his business, as such, separate from his individual funds, by depositing in bank to a separate "brokerage account" the drafts received for goods sold for his customers, that these drafts include his commission on such sales is not such a mingling of his own with the trust fund as will prevent the owner of the goods sold from following the fund, nor such as will enable the factor's general creditors to reach it by attachment. *Richardson v. St. Louis Nat. Bank*, 10 Mo. App. 246.

²⁵⁹ *Frith v. Cartland*, 2 Hem. & M. 417; *Davenport Plow Co. v. Lamp*, 80 Iowa, 722, 20 Am. St. Rep. 442; *Peak v. Ellicott*, 30 Kan. 156, 46 Am. Rep. 90; *Pundmann v. Schoenich*, 144 Mo. 149; *Bowers v. Evans*, 71 Wis. 133; *McLeod v. Evans*, 66 Wis. 409, 57 Am. Rep. 287. But see *Nonotuck Silk Co. v. Flanders*, 87 Wis. 237. Compare *Continental Nat. Bank v. Weems*, 69 Tex. 489, 5 Am. St. Rep. 85, where it is held that one who receives money of another in a fiduciary capacity, and expends it in payment of his own debts, does not thereby create a lien upon his entire estate for its repayment, but the trust estate must be clearly traced into specific property, in order that the cestui que trust may claim either the property itself or a lien upon it. *Metropolitan Nat. Bank v. Campbell Commission Co.*, 77 Fed. 705.

tion is impossible, that priority of lien should be adjudged in favor of the trust estate for the value of the trust property or funds, or proceeds of the trust property, entering into and constituting a part of the assets. * * * And it may be sufficient to entitle a party to equitable preference in the distribution of a fund in insolvency, that it appears that the fund or property of the insolvent remaining for distribution includes the proceeds of the trust estate, although it may be impossible to point out the precise thing in which the trust fund has been invested, or the precise time when the conversion took place."²⁶⁰

This rule is an equitable one, and the creditors of the estate have no just ground of complaint. The money or property was wrongfully mingled, as it were, with the assets of the trustee. The creditors, if permitted to enforce their claim as against the trust, would secure the payment of their claims out of trust moneys. If they are not permitted to do this they are simply denied the remedy of enforcing their claims against property acquired by the use of trust money. They are deprived of no right; for the property acquired by the trust money became subject to the trust, and therefore could not have been subject to the claims.²⁶¹ Thus, where the funds of a city went into the assets of a firm and swelled its property to that extent, all the property of the firm is chargeable with such amount, the city being a preferred creditor and entitled to a special lien on the firm's entire property. Nor does it lessen the lien that the city is unable to trace such funds or ascertain what property was secured by the firm with them.²⁶² So where bonds deposited with a banker for safe-keeping were by him disposed of, and the proceeds went to increase the assets of the bank which were shortly afterwards assigned by him for the benefit of creditors, the owner of the bonds had a paramount right to be first paid in full out of such assets.²⁶³

²⁶⁰ *Cavin v. Gleason*, 105 N. Y. 256, 262.

²⁶¹ *Davenport Plow Co. v. Lamp*, 80 Iowa, 722, 20 Am. St. Rep. 442.

²⁶² *Pundmann v. Schoenich*, 144 Mo. 149.

²⁶³ *Bowers v. Evans*, 71 Wis. 133.

If, however, the principal cannot so trace the fund or property into the estate of the trustee, or into some specific property, his right or lien would not be superior to that of general creditors.²⁶⁴ For example, it has been held that one for whom a banker had collected a draft before making a voluntary assignment is not entitled to a preference over other creditors if the proceeds of such collection were disposed of by the banker prior to the assignment, so that no part thereof came in any form to the hands of the assignee.²⁶⁵

§ 560. Rights of bona fide purchasers.

The doctrine that a principal may follow trust funds or property which has been diverted by the agent or otherwise come into the hands of a third person, only applies where the equitable right of the principal is superior to that of the third person. This right of the principal is cut off, therefore, and his remedy is against the agent, if the third person's position is such as to give him a superior equity.²⁶⁶ A person is not a bona fide purchaser within this rule, however, if he takes the property or funds with notice that they belong to the principal.²⁶⁷ And the same is true of persons who take the property or funds without notice of their trust character, but do not pay value therefor, as in the case of a mere donee of the funds or of property purchased with the same;²⁶⁸ existing creditors of the agent who

²⁶⁴ *Metropolitan Nat. Bank v. Campbell Commission Co.*, 77 Fed. 705; *Peters v. Bain*, 133 U. S. 670; *Little v. Chadwick*, 151 Mass. 109; *Twohy Mercantile Co. v. Melbye*, 78 Minn. 357; *Cavin v. Gleason*, 105 N. Y. 256; *Continental Nat. Bank v. Weems*, 69 Tex. 489, 5 Am. St. Rep. 85; *Nonotuck Silk Co. v. Flanders*, 87 Wis. 237.

²⁶⁵ *Nonotuck Silk Co. v. Flanders*, 87 Wis. 237. But compare *McLeod v. Evans*, 66 Wis. 401; *Bowers v. Evans*, 71 Wis. 133.

²⁶⁶ *Hemstreet v. Burdick*, 90 Ill. 444; and see cases cited *supra*, § 558, note 239.

²⁶⁷ *Central Nat. Bank v. Conn. Mut. L. Ins. Co.*, 104 U. S. 54; *Baker v. New York Nat. Bank*, 100 N. Y. 31, 53 Am. Rep. 150; and other cases cited under section 558, *supra*.

²⁶⁸ *Riehl v. Evansville Foundry Ass'n*, 104 Ind. 70.

do not surrender any rights in return for the property or funds;²⁶⁹ and attaching or execution creditors of the agent.²⁷⁰

Where a bona fide purchaser for value receives from an agent negotiable paper, which the principal has entrusted to him for collection, and there is nothing upon the face of the instrument to show the trust character in which it is held by the agent, such purchaser will acquire a good title thereto as against the principal.²⁷¹ If, however, there is anything upon the face of the paper to show that it was entrusted to the agent for a special purpose only, as where there is a restrictive indorsement upon it, one taking it from the agent has notice of the character in which it was held by him, and will not be allowed to claim title to the paper or its proceeds against the principal's claim thereto.²⁷²

§ 561. Necessity for title in principal.

The doctrine in relation to the following of trust funds or property by a principal does not apply to property or funds to which the principal has never had title, although the agent in receiving and disposing of the same may have been guilty of a breach of his duty to the principal giving the latter a right of action against him. Thus, if an agent violates his duty to his principal by receiving commissions from third persons, the principal's remedy is an action against the agent for money had and received. As the principal has never had title to the money, he cannot follow the fund in equity into the hands of third persons or into investments made by the agent.²⁷³

²⁶⁹ *Farmers' & M. Nat. Bank v. King*, 57 Pa. 202, 98 Am. Dec. 215; and cases cited ante, § 558.

²⁷⁰ *Farmers' & M. Nat. Bank v. King*, 57 Pa. 202, 98 Am. Dec. 215; and cases supra, § 558.

²⁷¹ *Hackett v. Reynolds*, 114 Pa. 328.

²⁷² *Sigourney v. Lloyd*, 8 Barn. & C. 622; *Treuttel v. Barandon*, 8 Taunt. 100; *Sweeny v. Easter*, 1 Wall. (U. S.) 166; *In re Armstrong*, 33 Fed. 405; *First Nat. Bank of Circleville v. Bank of Monroe*, 33 Fed. 408; *First Nat. Bank of Crown Point v. First Nat. Bank*, 76 Ind. 561, 40 Am. Rep. 261; *Cecil Bank v. Farmers' Bank*, 22 Md. 148; *Blaine v. Bourne*, 11 R. I. 119, 23 Am. Rep. 429; *City Bank of Sherman v. Weiss*, 67 Tex. 331, 60 Am. Rep. 29.

²⁷³ *Lister v. Stubbs*, 45 Ch. Div. 1.

CHAPTER XVII.

LIABILITIES OF AGENT TO THIRD PERSONS.

§ 562. In general.

I. LIABILITY OF AGENTS ON CONTRACTS.

§ 563. In general.

A. On Authorized Contracts.

§ 564. Liability of agent on authorized contracts for disclosed principal.

565. Presumption of intention to bind principal—Where agent pledges his own credit.

566. Where agent unintentionally binds himself.

567. Where neither principal nor agent is bound.

568. Liability of agent on contract in his own name—Agency undisclosed.

569. On contracts in his own name where he discloses the agency but conceals the name of his principal.

570. Admission of parol evidence.

571. On a contract for an incompetent or irresponsible principal.

572. On contract for a fictitious or nonexistent principal.

573. On contract for a foreign principal.

574. On contracts under seal.

575. On negotiable instruments.

576. Liability of public agents on contracts on behalf of the government.

B. On Unauthorized Contracts.

§ 577. In general.

578. Where agent knows he is unauthorized.

579. Where agent bona fide acts without any authority.

580. Where agent bona fide acts in excess of authority.

581. Exception to this rule—Death of principal.

582. Qualification of this rule—Where third party has knowledge of agent's want of authority.

I. LIABILITY OF AGENT ON CONTRACTS—Cont'd.

- § 583. Agent not liable unless contract would have been enforceable against principal if authorized.
- 584. Effect of ratification.
- 585. Nature of agent's liability in respect to unauthorized contracts.
- 586. Form of action against agent.
- 587. Burden of proof.
- 588. Measure of damages.
- 589. Application of these rules to public agents.

C. On Quasi Contracts—For Money Had and Received.

- § 590. In general.
- 591. For money received from third person for principal by mistake or fraud.
- 592. For money received from principal for third person.

II. IN TORT.

- § 593. In general.

A. Private Agents.

- § 594. For nonfeasance.
- 595. For misfeasance.
- 596. Distinction between nonfeasance and misfeasance—Meaning of terms.
- 597. Fact of agency or liability of principal no defense.
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- 600. Liability of agent for conversion.
- 601. Liability of agent for personal injuries.
- 602. Liability of agent for fraud and malice.
- 603. Liability of agent for misfeasance of subagent.
- 604. Liability of agent to subagent—Principal undisclosed.
- 605. As to joint liability of principal and agent.
- 606. Application of these rules to officers and agents of corporations.
- 607. Criminal responsibility of agent.

B. Public Agents.

- § 608. In general—For breach of duty owing to public only.
- 609. For tort committed in breach of duty to private individuals.
- 610. For torts of official subordinates.
- 611. For torts of private agents.

§ 562. In general.

Where one acts as agent for another, it is obvious that it is the primary intention of the parties that the agent's acts in the course of his transactions for the principal should be binding on the principal alone; and that, in the absence of an express or implied agreement to the contrary, there should be no intention to cause obligations to arise as between the agent and third persons. But although this is the primary intention of the parties, it is equally obvious that such obligations, on the part of the agent, may arise, either by express intent of the parties, or by an intention implied from the circumstances of the case. These obligations of the agent may arise out of contracts or out of torts; and they will be considered in that order in the following sections, treating, first, of an agent's obligations on contracts entered into by him as agent, and second, of his obligations for torts committed by him in the course of his employment.

In this connection, however, it must be observed that there is a distinction between private and public agents. A private agent as a general rule may bind his principal by all acts done within the scope of his real or apparent authority, and for acts beyond that the agent himself would be responsible; but a public agent may bind his principal only for acts done within his actual authority or within the authority which his principal has held him out as possessing. This distinction is primarily based on the manner in which authority is given to the agent. A private agent takes his powers by a private contract between himself and his principal, and unless a third person is notified of such contract, there is no means of his knowing what authority the agent possesses. A public agent, on the other hand, usually has his powers conferred upon him by public statutes or law, of which a third person is bound to take notice. But of this distinction more will be seen in the following sections, in treating more specifically of the agent's liability on contracts or torts.

I. LIABILITY OF AGENTS ON CONTRACTS.

§ 563. In general.

Where an agent undertakes to negotiate a contract for a real or alleged principal, a variety of circumstances may arise in the course of the transactions which will determine or aid in determining the third party's rights on such contract. Under these circumstances, a number of questions may arise as to who is liable on the contract, whether the principal alone is bound thereby; whether the agent has bound himself only; or whether the wording of the contract has been such that both the principal and agent are bound; or again, whether the contract is such that neither of them is bound by it. "Whether a contract made by persons acting or professing to act, as agents for others, binds their principals, or themselves, or both, is often one of great difficulty. The cases run so closely into each other, that whether a particular contract falls within one or the other of these lines, it is not easy to determine."¹ It may be that the agent has negotiated the contract in such a manner that the principal alone is bound by it; or it may be so that the agent alone is bound; or again it may have been so negotiated that both the principal and agent are liable on the contract, or that neither of them is liable. Thus, the contract may have been authorized and entered into in the name of or on behalf of a known principal, or in the name of the agent alone, or in the names of both the principal and agent. Or although the contract was unauthorized it may have been subsequently ratified by the principal; or it may have been made in the name of the agent; or the principal may refuse to ratify it although made in his name. So it may be that though the intention of the agent was to bind his principal only, yet his wording of the contract was such that he alone was bound, or that both or neither of them were bound by it. These questions as concerning the principal's liability to the third party, have been considered in a former chapter. They have also been considered to a certain extent in a former chapter in treat-

¹ *Simonds v. Heard*, 23 Pick. (Mass.) 120, 34 Am. Dec. 41.

ing of execution of authority; so that it will be the **purpose** of the following sections to consider an agent's liability to third persons arising out of contracts entered into by him for a real or alleged principal, as it comes into question under various circumstances.

This question of the agent's liability on the contract in any case depends upon the intention of the parties as determined from the contract and the surrounding circumstances. If the contract is an oral one, the question is usually one of fact for the jury; but if it is written it is usually a question of law to be determined by the court. As will be seen hereafter, an agent may be personally liable on a contract, although contrary to his intention:

(1) In some but not all jurisdictions, if he had no authority to enter into the contract, and it has not been ratified.

(2) In some jurisdictions but not all, if his principal was incompetent to contract, and is not bound.

(3) If he has contracted for a fictitious principal.

(4) If he has contracted in his own name.

The liability of an agent on contracts will be considered in the following sections in the following order: First, in reference to authorized contracts for his principal; second, in reference to unauthorized contracts, and third, in reference to quasi contracts.

A. On Authorized Contracts.

§ 564. Liability of agent on authorized contracts for disclosed principal.

Whether an agent, who makes contracts in the course of his employment, is personally liable thereon, depends upon the circumstances. As has been seen in a former chapter, in general, when one is known to be acting and contracting as the agent of another, his principal, his acts and contracts, if he is acting within the scope of his employment, will be deemed to be the acts and contracts of his principal, and if he makes an authorized contract in the name of his principal alone, so as to bind the principal, the contract is with the principal only and the other party cannot hold the agent

liable thereon.² This is true whether the contract is within his actual or apparent authority, for if the other party has contracted with the principal only, and the principal is bound, it is immaterial whether the agent has exceeded his actual authority or not.

The rule, therefore, is that an actually or apparently authorized contract by an agent in the name of or on behalf of a disclosed principal is binding on the principal only, and gives the other party to the contract no right of action against the agent,³ unless it plainly appears from the contract and

² Ante, § 524.

³ *England*: Green v. Kopke, 18 C. B. 549.

United States: Whitney v. Wyman, 101 U. S. 392; Baldwin v. Black, 119 U. S. 643.

Alabama: Sampson v. Fox, 109 Ala. 662, 55 Am. St. Rep. 950; Humes v. Decatur Land Imp. & Furnace Co., 98 Ala. 472; Ware v. Morgan, 67 Ala. 461.

California: Merrill v. Williams, 63 Cal. 70; Engels v. Heatly, 5 Cal. 135.

Colorado: Hewes v. Andrews, 12 Colo. 161.

Connecticut: Ogden v. Raymond, 22 Conn. 379, 58 Am. Dec. 429.

Georgia: Fleming v. Hill, 62 Ga. 751; Tiller v. Spradley, 39 Ga. 35.

Illinois: McCormick v. Seeberger, 73 Ill. App. 37, 178 Ill. 404; Flisk v. Carbonized Stone Co., 67 Ill. App. 327; Wheeler v. Reed, 36 Ill. 82; Scaling v. Knollin, 94 Ill. App. 443.

Indiana: Newman v. Sylvester, 42 Ind. 106; Pitman v. Kintner, 5 Blackf. 250, 33 Am. Dec. 469.

Iowa: Thilmany v. Iowa Paper Bag Co., 108 Iowa, 357, 75 Am. St. Rep. 259; Baker v. Chambles, 4 G. Greene, 428.

Kansas: McCubbin v. Graham, 4 Kan. 397.

Kentucky: Lewis v. Harris, 4 Metc. 353.

Louisiana: Barry v. Pike, 21 La. Ann. 221; Maury v. Ranger, 38 La. Ann. 485, 58 Am. Rep. 197; Rosenthal v. Myers, 25 La. Ann. 463.

Maine: Rogers v. March, 33 Me. 106.

Maryland: McClernan v. Hall, 33 Md. 293; Key's Ex'r v. Parnham, 6 Har. & J. 418.

Massachusetts: Southard v. Sturtevant, 109 Mass. 390; Simonds v. Heard, 23 Pick. 120, 34 Am. Dec. 41; Goodenough v. Thayer, 132 Mass. 152.

Missouri: Newland Hotel Co. v. Lowe Furniture Co., 73 Mo. App. 135.

concurring circumstances that the agent intends to make himself personally liable.⁴ And this rule is true whether the fact that the agent was acting for a known principal is disclosed by the agent himself or is otherwise brought to the notice of the third person;⁵ and although, by reason of some defect in the contract, it fails to bind his principal.⁶ The same rule applies where a party ratifies a contract entered into in his name without authority, for ratification relates back and is equivalent to an original authority.⁷ Where, from the nature and terms of the contract, it clearly appears, not only

Nebraska: *Wheeler v. Walden*, 17 Neb. 122; *Huffman v. Newman*, 55 Neb. 713.

New Hampshire: *Sleeper v. Weymouth*, 26 N. H. 34; *Hanover v. Eaton*, 3 N. H. 38.

New Jersey: *Kean v. Davis*, 20 N. J. Law, 425; *Tuttle v. Ayres*, 3 N. J. Law, 257.

New York: *Bonynge v. Field*, 81 N. Y. 159; *American Nat. Bank v. Wheelock*, 82 N. Y. 118; *Iserman v. Conklin*, 21 Misc. 194; *Whiting v. Saunders*, 23 Misc. 332.

North Carolina: *Davis v. Burnett*, 49 N. C. (4 Jones) 71, 67 Am. Dec. 263; *Meadows v. Smith*, 34 N. C. (12 Ired.) 18.

Oregon: *Stewart v. Perkins*, 3 Or. 509.

Pennsylvania: *Roberts v. Austin*, 5 Whart. 313; *Campbell v. Baker*, 2 Watts, 83.

South Carolina: *Waddell v. Mordecai*, 3 Hill, 22.

Texas: *Scottish-American Mortg. Co. v. Davis* (Tex. Civ. App.) 72 S. W. 217.

Vermont: *Peters v. Farnsworth*, 15 Vt. 155, 40 Am. Dec. 671; *Hall v. Huntoon*, 17 Vt. 244, 44 Am. Dec. 332.

West Virginia: *Piercy v. Hedrick*, 2 W. Va. 458, 98 Am. Dec. 774.

⁴ *Whitney v. Wyman*, 101 U. S. 392; *Hewes v. Andrews*, 12 Colo. 161; *Wheeler v. Reed*, 36 Ill. 82; *Baker v. Chambles*, 4 G. Greene (Iowa) 428; *Barry v. Pike*, 21 La. Ann. 221; *Key's Ex'r v. Parnham*, 6 Har. & J. (Md.) 418; *McClernan v. Hall*, 33 Md. 293; *Durston v. Butterfield*, 66 Barb. (N. Y.) 601; *Whiting v. Saunders*, 23 Misc. (N. Y.) 332; and see cases cited in preceding and following notes.

⁵ *Scaling v. Knollin*, 94 Ill. App. 448; *Warren v. Dickson*, 27 Ill. 115.

⁶ *Newland Hotel Co. v. Lowe Furniture Co.*, 73 Mo. App. 135; *Abeles v. Cochran*, 22 Kan. 405.

⁷ *Moody v. Meckelburg Co. v. Trustees M. E. Church*, 99 Wis. 49, holding that a minister is not personally liable on a contract for the

that the party is an agent, but that he means to bind his principal and act for him, and not to bind himself or act on his own account, he will not be held personally responsible, however inartificial may be the language used to express the intention.⁸

And this rule applies, although the agency was not disclosed at first, if it is disclosed before any negotiations or dealings are had under the contract, or before any obligations have been incurred or rights acquired by the third party. Thus, where an agent, acting as the owner of certain land, employed a broker to find a purchaser thereof, but disclosed his agency before any offer to purchase was made, and negotiations were thereafter had with the principal, the agent was not liable to the broker for his commission.⁹

§ 565. Presumption of intention to bind principal—Where agent pledges his own credit.

(a) **In general.**—Where an agent contracts on behalf of a disclosed or known principal, in reference to matters within the scope of his agency, and within the scope of the authority conferred upon him, there is always a legal presumption that he intended to bind his principal and not himself personally, and that credit is extended to the principal and not to the agent; and unless credit has been given to the agent expressly or exclusively, and it was clearly his intention to assume a personal responsibility, and this is shown by clear and explicit evidence, the agent will not be personally liable on such contract.¹⁰ This presumption, however, is not

church for the price of repairs to its building, which is subsequently ratified by it.

⁸ Kean v. Davis, 20 N. J. Law, 425.

⁹ Brackenridge v. Claridge, 91 Tex. 527; Scottish-American Mortg. Co. v. Davis (Tex. Civ. App.) 72 S. W. 217.

¹⁰ Higgins v. Senior, 8 Mees. & W. 834; Anderson v. Timberlake, 114 Ala. 377, 62 Am. St. Rep. 105; Hall v. Crandall, 29 Cal. 567, 89 Am. Dec. 64; Johnson v. Smith, 21 Conn. 627; Baker v. Chambles, 4 G. Greene (Iowa) 428; Key's Ex'r v. Parnham, 6 Har. & J. (Md.) 418; Steamship Bulgarian Co. v. Merchants' Despatch Transp. Co.,

a conclusive one, but may be rebutted; and if it is clearly shown that the agent expressly pledged his own credit on the contract, either exclusively or in addition to that of his principal, and if the third party, knowing of the principal, elects to give credit to the agent, the latter will be personally liable to the extent to which he has thus pledged his own credit or it has been given him;¹¹ the burden of proof, in such cases, being on the person who alleges that credit was given to the agent, unless the agent is *prima facie* bound by the contract, when the burden of proof is on him to show that the principal alone was bound.¹² As has been

135 Mass. 421; *Michael v. Jones*, 84 Mo. 578; *Foster v. Persch*, 68 N. Y. 400; *Meeker v. Claghorn*, 44 N. Y. 349; *Stanton v. Camp*, 4 Barb. (N. Y.) 274, 278; *Hall v. Lauderdale*, 46 N. Y. 70, 74.

As was said in *Hall v. Lauderdale*, 46 N. Y. 70, 74: "In construing oral agreements made by an agent, courts give effect to the real intention of the parties, unembarrassed by technical rules of construction; and when the act is within the authority, the presumption is, that the agent intends to bind the principal, and not himself."

¹¹ *Armstrong v. Stokes*, L. R. 7 Q. B. 598; *Anderson v. Timberlake*, 114 Ala. 377, 62 Am. St. Rep. 105; *Bell v. Teague*, 85 Ala. 211; *Johnson v. Smith*, 21 Conn. 627; *Nixon v. Downey*, 49 Iowa, 166; *Ross v. McAnaw*, 72 Mo. App. 99; *Kelly v. Thuey*, 102 Mo. 522; *Durston v. Butterfield*, 66 Barb. (N. Y.) 603; *Rathbon v. Budlong*, 15 Johns. (N. Y.) 1; *Stone v. Wood*, 7 Cow. (N. Y.) 453, 17 Am. Dec. 529; *Davis v. Burnett*, 49 N. C. (4 Jones) 71, 67 Am. Dec. 263; *Strider v. Winch & P. R. Co.*, 21 Grat. (Va.) 440; *Hull v. Brown*, 35 Wis. 652; and see cases cited in preceding note 10. *Wilder v. Cowles*, 100 Mass. 487, holding that an express warranty that a note is genuine, made by the agent of the seller, will bind the agent personally if it appears that such was the intention. The fact that an agent, in signing his principal's name to a note, added thereto a middle initial, which made the name identical with his own, does not justify a legal conclusion that the payee of the note gave credit to the agent and accepted his individual note as evidence of his personal liability. *Clealand v. Walker*, 11 Ala. 1058, 46 Am. Dec. 238.

¹² *Drake v. Flewellen*, 33 Ala. 106; *Gillaspie v. Wesson*, 7 Port. (Ala.) 454, 31 Am. Dec. 715; *Anderson v. Timberlake*, 114 Ala. 377, 62 Am. St. Rep. 105; *John Spry Lumber Co. v. McMillan*, 77 Ill. App. 280; *Pratt v. Beaupre*, 13 Minn. 187; *Collins v. Allen*, 12 Wend. (N. Y.) 356, 27 Am. Dec. 130; *Meeker v. Claghorn*, 44 N. Y. 349.

said: "To hold an agent personally liable in cases in which he discloses his principal, and that the services to be rendered are for the sole benefit of the principal, and the contract is within the scope of his authority, it must be shown that the credit was given exclusively to the agent, and that the agent was informed of that fact."¹³ There is no rule of law that prevents the agent from pledging his own credit if he so desires, although he was authorized to bind his principal.

(b) **Where agent describes himself as such.**—This doctrine applies, even though the agent has described himself in the contract as an agent. The mere fact that a person has the character of an agent does not prevent him from becoming personally liable on a contract; and if it appears from the contract that he has pledged his own credit or bound himself personally, the addition to his name of such words as "agent," "president," "trustee," etc., will be considered as mere *descriptio personae*.¹⁴ "The rule is, that when words which may be either descriptive of the person, or indicative of the character in which a person contracts, are affixed to the name of a contracting party, *prima facie*, they are descriptive of the person only; but the fact that they were

¹³ *Humes v. Decatur Land Imp. & Furnace Co.*, 98 Ala. 461; *Anderson v. Timberlake*, 114 Ala. 377, 62 Am. St. Rep. 105.

¹⁴ *Appleton v. Binks*, 5 East, 148; *Burrell v. Jones*, 3 Barn. & Ald. 47; *Duval v. Craig*, 2 Wheat. (U. S.) 45; *Grau v. McVicker*, 8 Biss. 13, Fed. Cas. No. 5,708; *Murphy v. Helmrich*, 66 Cal. 71; *Andrews v. Allen*, 4 Har. (Del.) 452; *Magruder v. Belt*, 12 App. D. C. 151; *Stoble v. Dills*, 62 Ill. 432; *Hayes v. Matthews*, 63 Ind. 412, 30 Am. Rep. 226; *Prather v. Ross*, 17 Ind. 495; *Miller v. Early*, 22 Ky. L. R. 825, 58 S. W. 789; *Tippets v. Walker*, 4 Mass. 595; *Simonds v. Heard*, 23 Pick. (Mass.) 120, 34 Am. Dec. 41; *Detroit v. Jackson*, 1 Doug. (Mich.) 106, 114; *Overton v. Stevens*, 8 Mo. 622; *Morgan v. Bergen*, 3 Neb. 209; *Timken v. Tallmadge*, 54 N. J. Law, 119; *Dayton v. Warne*, 43 N. J. Law, 659; *Kean v. Davis*, 20 N. J. Law, 425; *Stone v. Wood*, 7 Cow. (N. Y.) 453; *Townsend v. Hubbard*, 4 Hill (N. Y.) 351; *Whitehead v. Reddick*, 34 N. C. (12 Ired.) 95; *Fowle v. Kerchner*, 87 N. C. 49; *Quigley v. De Haas*, 82 Pa. 267; *Matthews v. Jenkins*, 80 Va. 463. And see *ante*, § 331 et seq., "Execution of Authority" for a further discussion of the addition of the words "agent" etc., to instruments executed by an agent.

not intended by the parties as descriptive of the person, but were understood as determining the character in which the party contracted, may be shown by extrinsic evidence; but the burden of proof rests upon the party seeking to change the *prima facie* character of the contract. And when a party who thus seeks to change the *prima facie* character of the contract, does so on the ground of agency in making the contract, the fact of his agency must be established; for if he acted as agent without authority, he is personally liable."¹⁵ Although an agent is duly authorized, and although he might avoid personal liability by acting in the name and behalf of his principal, still, if by the terms of his contract he binds himself personally, and engages expressly in his own name to pay or perform other obligations, he is responsible though he describes himself as agent.¹⁶

(c) **Intention governs.**—Whether or not an agent has pledged his own credit or bound himself personally in any particular case depends upon the intention of the parties as determined from the facts and circumstances surrounding that case. If the contract is a written one, it is ordinarily a question of law to be determined by the court, but if the contract is oral, it is a question of fact to be determined by the jury from all the facts and circumstances attending the transaction.¹⁷ Thus, if a known agent contracts an account within the scope of his authority, the fact that at the beginning of the transactions he directed the account to be charged to him is not conclusive that he intended to become sole debtor to the exclusion of all liability on the part of his principal, nor is it conclusive of the fact that credit was not extended to the principal. These questions are

¹⁵ *Pratt v. Beaupre*, 13 Minn. 190.

¹⁶ *Simonds v. Heard*, 23 Pick. (Mass.) 120, 34 Am. Dec. 41.

¹⁷ *Whitney v. Wyman*, 101 U. S. 392; *Anderson v. Timberlake*, 114 Ala. 377, 62 Am. St. Rep. 105; *Garrett v. Trabue*, 82 Ala. 227; *Fleming v. Hill*, 62 Ga. 751; *Wheeler v. Reed*, 36 Ill. 82; *Worthington v. Cowles*, 112 Mass. 30; *Steamship Bulgarian Co. v. Merchants' Despatch Transp. Co.*, 135 Mass. 421; *Hovey v. Pitcher*, 13 Mo. 191; *Brown v. Rundlett*, 15 N. H. 360; *Kean v. Davis*, 20 N. J. Law, 425; *Maryland Coal Co. v. Edwards*, 4 Hun (N. Y.) 432; *Cobb v. Knapp*, 71 N. Y. 348, 27 Am. Rep. 51.

for the consideration of the jury, to be taken in connection with all the circumstances attending the dealings between the parties in ascertaining whether exclusive credit was extended to the agent, and whether, with knowledge of that fact, he intended to assume individual responsibility.¹⁸ And a subsequent promise of payment of such account by such agent would not render him liable because the promise is given without a consideration.¹⁹ Such a promise made at the time of the creation of the accounts, *prima facie*, would be the promise of the principal, not involving the agent in personal liability, and, in an action to charge the agent therewith, evidence of such promise is admissible to show whether credit was extended to the agent solely, and whether it was his intention to bind himself and not the principal; and such promise is a circumstance attending the transaction between the parties, not to be disconnected from the other facts and circumstances, but to be considered by the jury in connection therewith.²⁰

(d) **Illustrations.**—That the person who acts as the agent for another in purchasing goods may make himself personally liable is not doubted, but this arises only by virtue of some special agreement or special circumstances, and does not grow out of the mere fact that one orders goods for the use of another, who is made known to the seller at the time.²¹ Thus, where one sells goods on credit to the agent of a known principal, the legal presumption is that he gave credit to the principal, and, to shift the responsibility to the agent, the proof should be satisfactory that the vendor sold upon the credit of the agent alone.²² And where, in such case, only the personal obligation of the agent is taken for the price of the property sold, the *prima facie* presumption arises that the

¹⁸ *Anderson v. Timberlake*, 114 Ala. 377, 62 Am. St. Rep. 105.

¹⁹ *Anderson v. Timberlake*, 114 Ala. 377, 62 Am. St. Rep. 105.

²⁰ *Anderson v. Timberlake*, 114 Ala. 377, 62 Am. St. Rep. 105.

²¹ *Durston v. Butterfield*, 66 Barb. (N. Y.) 603.

²² *Whitney v. Wyman*, 101 U. S. 392; *Dunton v. Chamberlain*, 1 Ill. App. 361; *John Spry Lumber Co. v. McMillan*, 77 Ill. App. 280; *Guest v. Burlington Opera-House Co.*, 74 Iowa, 457; *Ferris v. Kilmer*, 48 N. Y. 300; *Meeker v. Claghorn*, 44 N. Y. 349; *Foster v. Persch*, 68 N. Y. 400.

personal credit is given to the agent alone.²³ But entries on the books of the vendor charging the goods to the agent, though of much weight upon the question, are not conclusive evidence that the credit was given exclusively to him.²⁴ So where an agent binds himself personally to pay, he will be liable, although his principal may receive the consideration, and the agent's want of interest in the transaction, except as agent, be known to the other contracting party.²⁵ So an agent will be personally liable, where he indorses for his principal, without qualifying his signature,²⁶ although it is known to the person taking the indorsed paper that the one indorsing was merely an agent.²⁷ Where one, as president of an incorporated company having authority to make notes, signed a promissory note by which he promised to pay, it was held that he was liable upon the personal engagement and promise to pay, though he described himself as president of such company.²⁸

If, as has been seen in a preceding chapter, the third party, having knowledge of the principal, elects to give exclusive credit to the agent, he cannot thereafter hold the principal liable; though it would be otherwise if he had no knowledge of the principal.²⁹

§ 566. Where agent unintentionally binds himself.

An agent may even become liable on a contract, contrary to his actual intention. As has been seen, the intention of

²³ *Merrell v. Witherby*, 120 Ala. 418, 74 Am. St. Rep. 39; *Paige v. Stone*, 10 Metc. (Mass.) 160, 43 Am. Dec. 420; *Gates v. Brower*, 9 N. Y. 205, 59 Am. Dec. 530; *Coleman v. First Nat. Bank*, 53 N. Y. 388.

²⁴ *Foster v. Persch*, 68 N. Y. 400; *Meeker v. Claghorn*, 44 N. Y. 349.

²⁵ *Shordan v. Kyler*, 87 Ind. 38, 44; *Crum v. Boyd*, 9 Ind. 289; *Ahrens v. Cobb*, 9 Humph. (Tenn.) 643.

²⁶ *Leadbitter v. Farrow*, 5 Maule & S. 345; *Thomas v. Bishop*, 2 Strange, 955; *Hastings v. Lovering*, 2 Pick. (Mass.) 214, 13 Am. Dec. 420.

²⁷ *Hastings v. Lovering*, 2 Pick. (Mass.) 214, 13 Am. Dec. 420.

²⁸ *Barker v. Mechanic F. Ins. Co.*, 3 Wend. (N. Y.) 94, 20 Am. Dec. 664.

²⁹ *Miller v. Watt*, 70 Ga. 385; *Stehn v. Fasnacht*, 20 La. Ann. 83; *James v. Bixby*, 11 Mass. 34; *Hinsdale v. Partridge*, 14 Vt. 547.

the parties is to be determined from the terms of the contract and the surrounding circumstances, and if the contract shows a clear intention to bind the agent, he will be bound thereby, notwithstanding his actual intention may be otherwise. Hence, although an agent enters into a contract with the actual intention of binding his principal only, if his wording of the contract or the other circumstances of the case are such that he binds himself, he will be personally liable thereon, notwithstanding he has disclosed his principal.³⁰ And, in such cases, parol evidence may be introduced for the purpose of showing the intention of the parties, provided it is not contrary to the terms of the written contract. It may be introduced for the purpose of showing that another than the agent is also bound by the contract, but not for the purpose of relieving the agent from his liability thereon.³¹

"It is clear that, if the agent contracts in such a form as to make himself personally responsible, he cannot afterwards, whether his principal were or were not known at the time of the contract, relieve himself from that responsibility."³² Thus, where an agent enters into a written agreement to grant a lease of certain premises, and describes himself as making it on behalf of the principal, but in a subsequent part of the agreement it is provided that he would execute the lease, the agent is personally liable for a breach of the agreement.³³ So, even where he discloses the name of his principal, if he signs a written contract in his own name merely, which contract does not upon its face show that he was acting as the

³⁰ *Norton v. Herron*, 1 Car. & P. 648; *Bell v. Teague*, 85 Ala. 211; *McAlexander v. Lee*, 3 A. K. Marsh. (Ky.) 483; *Taber v. Cannon*, 8 Metc. (Mass.) 456, 461; *Simonds v. Heard*, 23 Pick. (Mass.) 120, 34 Am. Dec. 41; *Garland v. Stewart*, 31 Miss. 314; *Brown v. Rundlett*, 15 N. H. 360; *Savage v. Rix*, 9 N. H. 263; *Mills v. Hunt*, 20 Wend. (N. Y.) 431; *Meyer v. Barker*, 6 Bin. (Pa.) 228; *Ahrens v. Cobb*, 9 Humph. (Tenn.) 643.

³¹ *Ferris v. Thaw*, 72 Mo. 450; *Cream City Glass Co. v. Friedlander*, 84 Wis. 53, 36 Am. St. Rep. 895. See ante, § 339.

³² *Jones v. Littledale*, 6 Adol. & E. 486.

³³ *Norton v. Herron*, 1 Car. & P. 648; *Tanner v. Christian*, 4 El. & Bl. 591.

agent of another, or in an official capacity in behalf of the government, he will be personally bound thereby.⁸⁴

§ 567. Where neither principal nor agent is bound.

There may be cases in which neither the principal nor the agent is bound by the contract, although it was entered into by the agent with authority and with an intention of binding the principal. This happens where an agent, in attempting to enter into a contract for his principal, enters into one which the latter is not authorized to make, or does not use apt words to charge his principal, nor are the terms of the contract sufficient to charge him personally. "In order to bind the principal upon the instrument, there must be apt words to charge him; and, in like manner, if the principal is not bound by the instrument, the agent will not be bound thereby, unless it contains apt words to charge him."⁸⁵ In such cases the agent is clearly not liable on the contract, nor is he liable upon a warranty of authority because he has sufficient authority to enter into the contract; nor would he be liable upon a warranty of sufficiency of form of contract, unless he had expressly warranted its sufficiency, for such a warranty can hardly be implied. This works no hardship on the third party because he is also in fault by not seeing to it that the contract is executed in a form sufficient to bind the party intended to be bound. Of course if the third party acting in good faith is induced to enter into the contract by some fraud on the part of the agent, although the contract itself cannot be enforced against the principal or agent, the latter may be held liable for the fraud.⁸⁶

The fact that the principal was unauthorized to enter into the contract does not render the agent liable, if the contract does not otherwise bind him. There is no implied warranty by an agent that his principal has authority to make a contract signed by the agent, and the agent acting within the scope of his authority is not answerable upon such a contract

⁸⁴ *Mills v. Hunt*, 20 Wend. (N. Y.) 431; *Wheeler v. Reed*, 36 Ill. 81, 90.

⁸⁵ *Story, Ag. § 274b*; *Stetson v. Patten*, 2 Me. 358, 11 Am. Dec. 111.

⁸⁶ See post, § 602.

where his principal is not bound by it.³⁷ Thus, although a national bank is not bound by an unauthorized contract of guaranty, an agent of the bank, making such a contract within the scope of his authority on behalf of the bank, cannot be held personally liable thereon unless an intention to be so bound clearly appears.³⁸

**§ 568. Liability of agent on contract in his own name—
Agency undisclosed.**

(a) **In general.**—It has been seen in a preceding chapter that where an agent enters into a contract in his own name for an undisclosed principal, the third party has a right, upon the discovery of the principal, to hold the principal personally liable on the contracts;³⁹ but this is a matter of election on his part and if he so desires he may hold the agent personally. It is a well settled rule, therefore, that where an agent conceals the fact of his agency and enters into a contract in his own name as the ostensible principal, he may be treated as the principal by the party with whom he deals, and may be held liable on the contract to the same extent as if he were in fact the principal in interest.⁴⁰ The agent may be held responsi-

³⁷ *Thilmany v. Iowa Paper Bag Co.*, 108 Iowa, 357, 75 Am. St. Rep. 259.

³⁸ *Thilmany v. Iowa Paper Bag Co.*, 108 Iowa, 357, 75 Am. St. Rep. 259. And see *Knickerbocker v. Wilcox*, 83 Mich. 200, 21 Am. St. Rep. 595.

³⁹ *Ante*, § 457.

⁴⁰ *England*: *Rabone v. Williams*, 7 Term R. 360; *Simon v. Motivos*, 3 Burrow, 1922.

United States: *Ye Seng Co. v. Corbitt*, 9 Fed. 423.

Alabama: *Brent v. Miller*, 81 Ala. 309; *Wood v. Brewer*, 73 Ala. 259.

California: *Murphy v. Helmrich*, 66 Cal. 69.

Colorado: *Mackey v. Briggs*, 16 Colo. 143.

Connecticut: *Pierce v. Johnson*, 34 Conn. 274.

Delaware: *Sharp v. Swayne*, 1 Pen. 210.

Georgia: *Gerrard v. Moody*, 48 Ga. 96.

Illinois: *Wheeler v. Reed*, 36 Ill. 81; *Bickford v. First Nat. Bank*, 42 Ill. 238, 89 Am. Dec. 436; *John Spry Lumber Co. v. McMillan*, 77 Ill. App. 280; *Trench v. Hardin County Canning Co.*, 67 Ill. App. 269, affirmed in 168 Ill. 135.

Indiana: *Merrill v. Wilson*, 6 Ind. 426.

ble in such case for all liabilities, express or implied, arising out of the contract, to the same extent as if he were the real principal.⁴¹ Thus, where an agent makes a contract for the sale of goods, without disclosing his principal, he is personally liable for whatever obligation may arise out of the contract. The purchaser may, in such case, rely upon the responsibility

Iowa: Nixon v. Downey, 49 Iowa, 166; Thompson v. People's Bldg., L. & I. Co., 114 Iowa, 481; Fritz v. Kennedy, 93 N. W. 603.

Kentucky: Jones v. Johnson, 86 Ky. 530; Tutt v. Brown, 5 Litt. 2, 15 Am. Dec. 33.

Louisiana: Mithoff v. Byrne, 20 La. Ann. 363.

Maryland: York County Bank v. Stein, 24 Md. 447.

Massachusetts: Brigham v. Herrick, 173 Mass. 460; Bartlett v. Raymond, 139 Mass. 275; Welch v. Goodwin, 123 Mass. 71, 25 Am. Rep. 24.

Michigan: Mitchell v. Beck, 88 Mich. 342; Lewis v. Weidenfeld, 114 Mich. 581.

Minnesota: Pratt v. Beaupre, 13 Minn. 186; Amans v. Campbell, 70 Minn. 493, 68 Am. St. Rep. 547.

Missouri: McClellan v. Parker, 27 Mo. 162; Porter v. Merrill, 138 Mo. 555.

Nebraska: Bridges v. Bidwell, 20 Neb. 185; Jackson v. McNatt, 93 N. W. 425.

New Hampshire: Batchelder v. Libbey, 66 N. H. 175.

New York: Argersinger v. Macnaughton, 114 N. Y. 535, 11 Am. St. Rep. 687; Mills v. Hunt, 20 Wend. 431; Cobb v. Knapp, 71 N. Y. 348, 27 Am. Rep. 51; McComb v. Wright, 4 Johns. Ch. 659.

Ohio: Lee v. Fraternal Mut. Ins. Co., 1 Handy, 217.

Pennsylvania: Beymer v. Bonsall, 79 Pa. 298.

South Carolina: Davenport v. Riley, 2 McCord, 198; Conyers v. Magrath, 4 McCord, 392.

South Dakota: Lindsay v. Pettigrew, 5 S. D. 500, 503.

Texas: Johnson v. Armstrong, 83 Tex. 325, 29 Am. St. Rep. 648; Sydnor v. Hurd, 8 Tex. 98; Williams v. Leon & H. Blum Land Co. (Tex. Civ. App.) 55 S. W. 374.

Vermont: Royce v. Allen, 28 Vt. 234; Baldwin v. Leonard, 39 Vt. 260, 94 Am. Dec. 324; Button v. Winslow, 53 Vt. 430.

West Virginia: Poole v. Rice, 9 W. Va. 73.

⁴¹ Wheeler v. Reed, 36 Ill. 81; Scaling v. Knollin, 94 Ill. App. 443; Welch v. Goodwin, 123 Mass. 71, 25 Am. Rep. 24; Amans v. Campbell, 70 Minn. 493, 68 Am. St. Rep. 547; Argersinger v. Macnaughton, 114 N. Y. 539, 11 Am. St. Rep. 687; Royce v. Allen, 28 Vt. 234; and see cases cited in preceding note 40.

of the person with whom he deals for the performance of the contract, and is not required to look elsewhere to obtain it.⁴² And if the goods have been sold with a warranty, the purchaser is not bound to return them upon discovery by him of the breach of warranty; but he may retain them and seek his remedy against the agent upon the breach of the warranty; and the fact that the agent was selling for another to whom he was required to account for the proceeds of sale does not affect this right of the purchaser, where the latter, soon after the sale, advises the agent of his claim for damages for the breach.⁴³ And if the agent in an action upon an alleged warranty sets up in defense, to avoid personal liability, the fact that he was acting as an agent in making the warranty, the burden of proof is on him to show that he had authority to bind his principal.⁴⁴

(b) **Where agent deals with a partnership.**—Whether an agent sufficiently discloses his agency to a partnership, in order to escape personal liability, depends upon whether he discloses such fact to the partner with whom he is dealing, or to another partner in the course of the transaction. Thus, mere knowledge by one partner of the defendant's agency, in making a purchase, not acquired in the course of partnership business, does not amount to constructive notice of that fact to the firm; and where such partner has no part in making a sale to the agent, and the sale to him is made by another partner without knowledge of the agency, the agent will be personally liable. But it will be otherwise where the transaction is commenced with a partner to whom the agency is disclosed, and completed with another partner to whom it is not disclosed.⁴⁵

(c) **Duty to disclose agency.**—This rule is clearly a just one and works no hardship upon the agent, because he has

⁴² *Argersinger v. Macnaughton*, 114 N. Y. 535, 11 Am. St. Rep. 687.

⁴³ *Argersinger v. Macnaughton*, 114 N. Y. 535, 11 Am. St. Rep. 687; *Blakeman v. Mackay*, 1 Hilt. (N. Y.) 266. And in such case the principal need not be joined as a defendant with his agent. *Ash v. Beck* (Tex. Civ. App.) 68 S. W. 53.

⁴⁴ *Wheeler v. Reed*, 36 Ill. 81.

⁴⁵ *Baldwin v. Leonard*, 39 Vt. 260, 94 Am. Dec. 324.

it in his power, if he desires to escape personal liability, to do so by disclosing his principal and contracting in his name. And the duty is upon the agent, if he would avoid personal liability, to disclose his agency, and not upon others to discover it, and if he fails so to do, and deals with persons unaware of his agency, he must answer personally for the liabilities he contracts;⁴⁶ and if he does not make such a disclosure the presumption is that he intended to bind himself personally.⁴⁷ Upon such disclosure, the party dealing with the agent may or may not, as he pleases, enter into a contract upon the responsibility of the named principal; but to permit an agent to turn over to his customer an undisclosed, and to the latter unknown, principal, might have the effect to deny to the customer the benefit of any available or responsible means of remedy or relief founded upon the contracts.⁴⁸ Thus, where a person requests another to perform services, the presumption is that he is bound to pay for them himself, and if he would obligate any one else he must clearly indicate by apt words or by other means that the services are to be rendered not for himself but for another, whom the party employed accepts as a debtor.⁴⁹

(d) **Contract must bind the agent.**—This rule does not apply, however, unless the agent expressly binds himself, where the party dealing with him has knowledge of the agency or of circumstances which, if inquired into, would have disclosed the principal.⁵⁰ Thus, where an agent, without expressly binding himself, requests an architect to prepare plans and specifications for a college building, the latter being aware of circumstances which, if inquired into, would have developed a responsible principal, such agent will not

⁴⁶ *Baldwin v. Leonard*, 39 Vt. 260, 94 Am. Dec. 324; *Bickford v. First Nat. Bank*, 42 Ill. 238, 89 Am. Dec. 436; *Argersinger v. Macnaughton*, 114 N. Y. 535, 11 Am. St. Rep. 687; *Kain v. Humes*, 5 Sneed (Tenn.) 610.

⁴⁷ *Raymond v. Crown & E. Mills*, 2 Metc. (Mass.) 319; *Cobb v. Knapp*, 71 N. Y. 349, 27 Am. Rep. 51.

⁴⁸ *Argersinger v. Macnaughton*, 114 N. Y. 535, 11 Am. St. Rep. 687.

⁴⁹ *Dulon v. Camp*, 28 Misc. (N. Y.) 548.

⁵⁰ *Sharp v. Swayne*, 1 Penn. (Del.) 210.

be personally bound for services rendered in the preparation of such plans and specifications.⁵¹ So the failure of an agent expressly to disclose his agency does not make him personally liable upon a contract made by him, where the other party thereto knew that he was dealing with the principal, and had had prior dealings of a similar nature with the principal.⁵²

(e) **Special agents.**—Since an agent's liability in such cases is in its character primary, an agent to whom credit is given personally cannot be relieved therefrom by reason of the fact that he generally acts as agent for disclosed principals in other transactions, as where he is known to be a commission merchant, auctioneer, or other professional agent,⁵³ though it has been held that where a person in his dealings with another as to similar matters has always dealt as an agent of others, it is necessary, in order to charge him with liability for the transaction in question, to show acts or statements by him from which an inference could be drawn that he was dealing otherwise than formerly, or that he interposed his personal liability.⁵⁴ Thus, a factor who sells oil with a warranty of quality, without designating himself as agent, is personally liable on the warranty, although the vendee was informed before action brought that the factor was not acting for himself.⁵⁵ So an auctioneer acting as the agent of another in the sale of property is personally responsible as vendor, unless at the time of the sale he discloses the name of his principal; his general employment as auctioneer is not per se notice that he acts as agent.⁵⁶

⁵¹ *Johnson v. Armstrong*, 83 Tex. 325, 29 Am. St. Rep. 648.

⁵² *Forrest v. McCarthy*, 30 Misc. (N. Y.) 125.

⁵³ *Wood v. Brewer*, 73 Ala. 259; *Brent v. Miller*, 81 Ala. 309; *Wheeler v. Reed*, 36 Ill. 81, 90; *Hastings v. Lovering*, 2 Pick. (Mass.) 214, 13 Am. Dec. 420; *Mills v. Hunt*, 20 Wend. (N. Y.) 431. The mere fact that a person is an auctioneer is not sufficient notice to purchasers that he is not selling his own goods. *Scaling v. Knollin*, 94 Ill. App. 443.

⁵⁴ *Falk v. Wolfsohn*, 7 Misc. 313, 57 N. Y. State Rep. 553.

⁵⁵ *Hastings v. Lovering*, 2 Pick. (Mass.) 214, 13 Am. Dec. 420.

⁵⁶ *Mills v. Hunt*, 20 Wend. (N. Y.) 431; *Schell v. Stephens*, 50 Mo. 375.

(f) Mere commencement of action against principal is not an election to hold him.—Although the third party has a right to elect whether he will hold the agent or the principal responsible, a subsequent disclosure of the principal, and the commencement of an action against him, are not conclusive of an election to hold him only responsible, and does not bar a subsequent action against the agent.⁵⁷ Neither the agent nor principal in such a case would be discharged short of satisfaction. The fact of commencing the action and the statements in the complaint are proper for the jury upon the contested fact, but they do not operate as a legal discharge.⁵⁸

§ 569. On contracts in his own name where he discloses the agency but conceals the name of his principal.

(a) In general.—The rule discussed in the preceding section also applies to cases where the agent enters into a contract in his own name for his principal, and discloses the fact of the agency but does not reveal his principal's name. The fact that the agent discloses the circumstance that he is acting as an agent for another does not relieve him from liability if he does not disclose who that other is; in such cases, if the terms of the contract are sufficient to bind him, the agent will generally be treated as the principal, and be held personally liable on the contract, to the same extent as if he were the real instead of the ostensible principal, unless it clearly appears that the intention was to contract as agent only, and that the other party so understood;⁵⁹ though he

⁵⁷ *Raymond v. Crown & E. Mills*, 2 Metc. (Mass.) 319; *Curtis v. Williamson*, L. R. 10 Q. B. 57; *Cobb v. Knapp*, 71 N. Y. 348, 27 Am. Rep. 51; *Tew v. Wolfsohn*, 77 App. Div. (N. Y.) 454.

⁵⁸ *Cobb v. Knapp*, 71 N. Y. 348, 27 Am. Rep. 51; *Beymer v. Bon-sall*, 79 Pa. 298.

⁵⁹ *Kelner v. Baxter*, L. R. 2 C. P. 174; *Thomson v. Davenport*, 9 Barn. & C. 78; *Ye Seng Co. v. Corbitt*, 9 Fed. 423; *Neeley v. State*, 60 Ark. 66, 46 Am. St. Rep. 148; *Scaling v. Knollin*, 94 Ill. App. 443; *Macdonald v. Bond*, 195 Ill. 122; *Lull v. Anamosa Nat. Bank*, 110 Iowa, 537; *Pugh v. Moore*, 44 La. Ann. 209; *Welch v. Goodwin*, 123 Mass. 77, 25 Am. Rep. 24; *Winsor v. Griggs*, 5 Cush. (Mass.) 210; *Lewis v. Weidenfeld*, 114 Mich. 581; *Pratt v. Beaupre*, 13 Minn.

afterwards discloses the principal's name.⁶⁰ If the agent acts on behalf of himself and his undisclosed principal, both are liable on the contract.⁶¹

(b) **Disclosure.**—The disclosure of an agency is not completely made unless it embraces the name of the principal, or so discloses him as to enable the opposite party to have recourse to him in case the agent had authority to bind him. Without this, the party dealing with the agent may understand that he intended to give his personal liability and responsibility in support of the contract and for its performance.⁶² It is not enough that the information gives the person dealing with the agent the means of ascertaining the name of the principal, but he must have actual knowledge or the agent will be bound.⁶³ A statement that the premises

187; *Brown v. Ames*, 59 Minn. 476; *Dockarty v. Tillotson*, 64 Neb. 432; *Argersinger v. Macnaughton*, 114 N. Y. 539, 11 Am. St. Rep. 687; *Cobb v. Knapp*, 71 N. Y. 348, 27 Am. Rep. 51; *McClure v. Central Trust Co.*, 165 N. Y. 108; *Good v. Rumsey*, 50 App. Div. (N. Y.) 280; *Nichols v. Well*, 30 Misc. (N. Y.) 441; *Forney v. Shipp*, 49 N. C. (4 Jones) 527; *Meyer v. Barker*, 6 Bin. (Pa.) 228; *Long v. McKissick*, 50 S. C. 218; *Johnson v. Armstrong*, 83 Tex. 325, 29 Am. St. Rep. 648.

A statute providing that where one transacts business as a trader with the addition of the word "agent," and fails to disclose the name of his principal or partner, all the property acquired or used in such business shall, as against his creditors, be liable for his debts, unless he be a licensed auctioneer or commission merchant, applies to one who carries on a general mercantile business. *Morris v. Clifton Forge Grocery Co.*, 46 W. Va. 197, construing Code, c. 100, § 13; *Hoge v. Turner*, 96 Va. 624, holding that the provisions of § 2877 of the Code relating to doing business as a trader, with the addition of the words "factor," "agent," etc., without disclosing the name of the principal, apply without regard to knowledge by the creditor of the principal, if principal there be.

⁶⁰ *Lull v. Anamosa Nat. Bank*, 110 Iowa, 537; *Nelson v. Andrews*, 19 Misc. (N. Y.) 623; *Whiting v. Saunders*, 23 Misc. (N. Y.) 332.

⁶¹ *Lull v. Anamosa Nat. Bank*, 110 Iowa, 537.

⁶² *Argersinger v. Macnaughton*, 114 N. Y. 535, 11 Am. St. Rep. 687; *Waddell v. Mordecai*, 3 Hill (S. C.) 22. "It is not enough merely to give notice of the fact that he is acting as agent; he must also disclose who his principal is." *Brown v. Ames*, 59 Minn. 482.

⁶³ *Nelson v. Andrews*, 19 Misc. (N. Y.) 623.

in question belonged to a certain "estate" is not a disclosure of the name of the principal which will relieve an agent of liability.⁶⁴ As has been said: "The rule is no less salutary than reasonable that an agent may be treated as the party to the contract made by him in his own name, unless he advises the other party to it of the name of the principal whom he assumes to represent in making it where that is unknown to such party."⁶⁵ "The mere fact of a person professing to sign a contract for or on behalf or as agent for another will not per se prevent responsibility as a contracting party attaching upon the former"⁶⁶ But it is not necessary that the agent should name every one of a class or company of his principals, who are usually designated by some brief descriptive term, at least until he is called on for a more precise specification.⁶⁷

(c) **Reason for rule.**—The reason for this rule is that the party dealing with the agent may have the means of determining the responsibility of the principal for liabilities which may grow out of the transactions. A man has a right to the character, credit, and substance of the person with whom he contracts; and if he enters into a contract with an agent, who does not disclose his principal's name, the presumption is that he is invited to give credit to the agent.⁶⁸ Thus, where an agent sells commercial paper for another, in order to relieve himself from personal liability, he should disclose not only the fact of his agency, but also the name of his principal.⁶⁹ So, where a vendor or purchaser of goods deals in his own name, without disclosing the name of his principal, he is personally bound by the contract; and it makes no difference that he is known to the other party to be an

⁶⁴ *Nelson v. Andrews*, 19 Misc. (N. Y.) 623.

⁶⁵ *Argersinger v. Macnaughton*, 114 N. Y. 535. 11 Am. St. Rep. 687.

⁶⁶ *Kelner v. Baxter*, L. R. 2 C. P. 180.

⁶⁷ *Waddell v. Mordecai*, 3 Hill (S. C.) 22.

⁶⁸ *Neeley v. State*, 60 Ark. 66, 46 Am. St. Rep. 148; *Rendell v. Harriman*, 75 Me. 497, 46 Am. Rep. 421; *Souhegan Nat. Bank v. Boardman*, 46 Minn. 293; *Casco Nat. Bank v. Clark*, 139 N. Y. 307, 36 Am. St. Rep. 705; and other cases cited in notes *supra*.

⁶⁹ *Brown v. Ames*, 59 Minn. 476.

auctioneer or broker, who is usually employed in selling property as the agent of others.⁷⁰ So if one signs a submission to arbitration as agent without disclosing the name of his principal, the principal being unknown to the other party, such agent is personally bound by the submission.⁷¹ So where an agent bids off land at an execution sale, as agent, but refuses to disclose the name of his principal, he is personally liable for the amount of the bid, and the fact that he discloses his principal long after the bid was entered in the sheriff's book of sales does not relieve him.⁷²

(d) **Application.**—It has been held that this rule, in cases where the agency but not the name of the principal is disclosed, applies primarily to certain classes of agents, as auctioneers and factors, and that it does not apply to other agents except where evidence of a usage of trade is admissible to bind the agent personally.⁷³ Thus, this rule has been held to apply where a contract is made with an auctioneer for the purchase of goods at a public sale, and no disclosure is made of the principal on whose behalf the goods are sold;⁷⁴ or where an agent, at the time of the purchase of goods, acknowledges that he is purchasing for another person, but does not then name him;⁷⁵ or where an agent signs a charter party expressly "as agent for principals," without disclosing the principals.⁷⁶

⁷⁰ *Wheeler v. Reed*, 36 Ill. 81; *Scaling v. Knollin*, 94 Ill. App. 443.

⁷¹ *Macdonald v. Bond*, 195 Ill. 122; *Winsor v. Griggs*, 5 Cush. (Mass.) 210.

⁷² *Long v. McKissick*, 50 S. C. 218. And see *Lull v. Anamosa Nat. Bank*, 110 Iowa, 537.

⁷³ *Wharton*, Ag. § 502; *Imperial Bank v. London & St. K. Docks Co.*, 5 Ch. Div. 195; *Hutchinson v. Tatham*, L. R. 8 C. P. 482; *Dale v. Humfrey*, El. Bl. & El. 1004; *Fleet v. Murton*, L. R. 7 Q. B. 126.

⁷⁴ *Jones v. Littledale*, 3 Adol. & E. 486; *Hanson v. Roberdeau*, 1 Peake, 163.

⁷⁵ *Thomson v. Davenport*, 9 Barn. & C. 78.

⁷⁶ *Hutchinson v. Tatham*, L. R. 8 C. P. 482.

§ 570. Admission of parol evidence.

Where an agent contracts in writing in his own name, for an undisclosed or unnamed principal, parol evidence, as has been seen in the former chapter, may be admitted for the purpose of charging the principal, when discovered, on the written contract as an additional party thereto, or in other words, for the purpose of showing that the ostensible principal was in fact acting as agent for another, and thus giving the real principal the rights on the contract and charging him with liabilities thereon.⁷⁷ But if the contract contains terms sufficient to bind the agent personally; whether the principal is disclosed or undisclosed, such evidence is not admissible for the purpose of discharging or exonerating the agent from his personal responsibility under the contract, as by showing that he was acting merely as an agent for a principal;⁷⁸ even though he should propose to show, if allowed, that he disclosed his agency and mentioned the name of his principal at the time the contract was executed.⁷⁹ Thus, persons executing a contract of sale as apparent principals will not be permitted to show by parol evidence that they were acting as agents of another, when sued on a warranty implied by such contract.⁸⁰

This evidence is admissible in the former case because it does not contradict or vary the terms of the written contract, but shows that such contract also binds another; but it is inadmissible in the latter case because it does contradict the

⁷⁷ Ante, § 339.

⁷⁸ *Higgins v. Senior*, 8 Mees. & W. 834; *Magee v. Atkinson*, 2 Mees. & W. 440; *Jones v. Littledale*, 6 Adol. & E. 486; *Hypes v. Griffin*, 89 Ill. 137; *Miller v. Early*, 22 Ky. L. R. 825, 58 S. W. 789; *Lewis v. Weidenfeld*, 114 Mich. 581; *Kean v. Davis*, 20 N. J. Law, 425; *Heffron v. Pollard*, 73 Tex. 96, 15 Am. St. Rep. 764; *Bulwinkle v. Cramer*, 27 S. C. 376, 13 Am. St. Rep. 645; *Shuey v. Adair*, 18 Wash. 188, 63 Am. St. Rep. 879; *Weston v. McMillan*, 42 Wis. 567; *Cream City Glass Co v. Friedlander*, 84 Wis. 53, 36 Am. St. Rep. 895.

⁷⁹ *Bulwinkle v. Cramer*, 27 S. C. 376, 13 Am. St. Rep. 645; *Nash v. Towne*, 5 Wall. (U. S.) 703; *Kean v. Davis*, 20 N. J. Law, 429.

⁸⁰ *Bulwinkle v. Cramer*, 27 S. C. 376, 13 Am. St. Rep. 645; *Cream City Glass Co. v. Friedlander*, 84 Wis. 53, 36 Am. St. Rep. 895.

terms of the written contract by tending to discharge from liability thereon one whose name appears on the contract, and whom it purports to bind. "To allow evidence to be given that the party who appears on the face of the instrument to be personally a contracting party, is not such, would be to allow parol evidence to contradict the written agreement, which cannot be done."⁸¹ Nor can parol evidence be introduced, when a written contract is made in the name of the principal and signed in his name by another as his agent, for the purpose of showing that in signing the contract, the one who purported to sign it as agent signed the name of his principal for his own benefit with the intention of binding himself, or that credit had been given to the agent exclusively. The effect of such evidence would be to show an intention exactly contrary to that expressed on the face of the writing.⁸²

But an agent may show, in order to relieve himself from liability upon a written contract apparently binding him, that it was agreed by all the parties, when it was signed, that it should not take effect as a contract, and that the real contract was an unwritten one which bound only his principal. In other words, he may show that the writing was a mere colorable transaction, that it was understood by the parties to be not a contract at all, and that the real contract was not in writing, and bound only his principal.⁸³

§ 571. On a contract for an incompetent or irresponsible principal.

(a) **In general.**—Where an agent enters into a contract for an alleged principal who is incompetent or irresponsible, that is, has no legal status or responsibility, at the time of the contract, the presumption is that he contracts on his own responsibility and intends to bind himself, and unless he is relieved from such responsibility by the express terms of the

⁸¹ *Higgins v. Senior*, 8 Mees. & W. 834.

⁸² *Heffron v. Pollard*, 73 Tex. 96, 15 Am. St. Rep. 764; *McClernan v. Hall*, 33 Md. 293.

⁸³ *Heffron v. Pollard*, 73 Tex. 96, 15 Am. St. Rep. 764; *Rogers v. Hadley*, 2 Hurl. & C. 227.

contract or by circumstances showing an intention to relieve himself, he will ordinarily be personally liable on the contract.⁸⁴ This rule is based upon the principle that where one who is capable of contracting, contracts in his own name, although he is the agent of another who is incapable of contracting, he is presumed to intend to bind himself, since in no other way could the contract have any validity,⁸⁵ for there would be no one against whom it could be enforced.

As has been said: "The rule is founded upon a presumption of fact, and is not the expression of any positive or rigid legal principle. The presumption referred to is that the parties to a contract contemplate the creation of a legal obligation capable of enforcement, and that, therefore, it is understood that the obligation shall rest on the individuals who actively participate in the making of the contract, because of the difficulty in all cases, the impossibility in many, of fixing it upon" a principal who has no legal status. "If, however, the person with whom the contract is made expressly agrees to look to another source for the performance of its obligations, or if the circumstances be such as to disclose an intention not to charge the agent, there is no longer reason to indulge the presumption, and it may be rebutted by proof of such facts."⁸⁶

Thus, this rule has been held to apply to a contract entered into by an agent in his own name for a married wo-

⁸⁴ *Murphy v. Helmrich*, 66 Cal. 69; *Hastings v. Lovering*, 2 Pick. (Mass.) 214, 13 Am. Dec. 420; *Heath v. Goslin*, 80 Mo. 310, 50 Am. Rep. 505; *Blakely v. Bennecke*, 59 Mo. 193; *Anderson v. Stapel*, 80 Mo. App. 115; *Codding v. Munson*, 52 Neb. 580, 66 Am. St. Rep. 524; *Learn v. Upstill*, 52 Neb. 271; *Booth v. Wonderly*, 36 N. J. Law, 255; *Timken v. Tallmadge*, 54 N. J. Law, 120; *Eichbaum v. Irons*, 6 Watts & S. (Pa.) 67, 40 Am. Dec. 540; *Edings v. Brown*, 1 Rich. Law (S. C.) 255; *Button v. Winslow*, 53 Vt. 430. Where a principal is incapable of issuing a bill or note, his agent, on issuing it, binds himself personally. *Anderson v. Stapel*, 80 Mo. App. 115.

⁸⁵ *Heath v. Goslin*, 80 Mo. 310, 50 Am. Rep. 505; *Timken v. Tallmadge*, 54 N. J. Law, 120; *Booth v. Wonderly*, 36 N. J. Law, 255; *Story*, Ag. § 281.

⁸⁶ *Codding v. Munson*, 52 Neb. 580, 66 Am. St. Rep. 525.

man.⁸⁷ So, the members of a committee of a political meeting, appointed to provide a free public dinner for the party, have been held personally liable for the bill.⁸⁸ So an agent is liable to an action for misleading an innocent third person, by assuming to act on behalf of a principal who is a lunatic.⁸⁹

(b) **Unincorporated clubs and societies.**—Another good illustration of this rule is in the case of a contract entered into

⁸⁷ *Hoppe v. Saylor*, 53 Mo. App. 4; *Edings v. Brown*, 1 Rich. Law (S. C.) 255.

⁸⁸ *Eichbaum v. Irons*, 6 Watts & S. (Pa.) 67, 40 Am. Dec. 540. "This case is unique," says Gibson, C. J., "but readily resolvable on principle. It seemed, at first, to resemble the case of a committee sued for the price of meats and wines furnished on its order to a club; but though the defendants acted in obedience to a constituency, it was unlike a club, which is a permanent body, an intangible and irresponsible one. The plaintiff, being examined without objection, testified that he furnished the dinner on the order of the whig party, but that it was to the committee he looked for payment. It is probable that neither he nor they spent a thought on the subject; but it is not, therefore, to be concluded that he agreed to give the dinner for nothing; and the responsibilities of the parties concerned are to be determined on the ordinary principles of the law of contracts. The facts are, that the defendants and others, being a committee constituted by a popular meeting to order and manage a dinner, contracted with the plaintiff to furnish it, and directed the secretary of the meeting to report the proceeding to the Tippecanoe Club, an affiliated society, for its approbation. Now it will not be pretended that nobody was responsible to the plaintiff for the order; and, if the defendant were not, who else was? Were they to be viewed as the agents of a club, we would have something palpable to deal with. The question would be whether they had become personally liable by having exceeded their authority, or whether they had not contracted on the credit of their constituents. But a club is a definite association, organized for indefinite existence; not an ephemeral meeting, for a particular occasion, to be lost in the crowd at its dissolution. It would be unreasonable to presume that the plaintiff agreed to trust to a responsibility so desperate, or furnish a dinner on the credit of a meeting which had vanished into nothing. It was already defunct; and we are not to imagine that the plaintiff consented to look to a body which had lost its individuality by the dispersion of its members in the general mass."

⁸⁹ *Drew v. Nunn*, 4 Q. B. Div. 661.

by an agent for an unincorporated club, society, or association. The liability in such cases depends, of course, upon to whom credit is given. If it is expressly understood between the agent and the other contracting party that credit shall be extended to an unincorporated club or society alone, and the agent was authorized to pledge its credit, he would be relieved from any liability on the contract.⁹⁰ But, in the absence of such an understanding between the parties, an agent contracting for such a principal is presumed to do so upon his own credit, and he will be personally liable on the contract;⁹¹ unless there is a statutory enactment in the particular jurisdiction, allowing such a club or society to bind itself by contract, in which case it may also be bound by its agent; and the latter would not be personally liable on an authorized contract entered into by him for such society or

⁹⁰ *Steele v. Gourley*, 3 Times Law R. 772; *Jones v. Hope*, 3 Times Law R. 247; *Codding v. Munson*, 52 Neb. 580, 66 Am. St. Rep. 524; *Pain v. Sample*, 158 Pa. 428.

⁹¹ *Steele v. Gourley*, 3 Times Law R. 772; *Overton v. Hewett*, 3 Times Law R. 246; *Cullen v. Queensberry*, 1 Brown Ch. 101; *Lewis v. Tilton*, 64 Iowa, 220, 52 Am. Rep. 436; *Comfort v. Graham*, 87 Iowa, 295; *Reding v. Anderson*, 72 Iowa, 498; *Blakely v. Bennecke*, 59 Mo. 193; *Codding v. Munson*, 52 Neb. 580, 66 Am. St. Rep. 524; *Eichbaum v. Irons*, 6 Watts & S. (Pa.) 67, 40 Am. Dec. 540; *Winona Lumber Co. v. Church*, 6 S. D. 498; *Steele v. McElroy*, 1 Sneed (Tenn.) 341.

In *Cheeny v. Clark*, 3 Vt. 431, 23 Am. Dec. 219, it was held that a building committee of a mere voluntary association are not personally liable for services rendered to such association, where they have no funds of the association in their hands to pay for the services. The court in this case seemed to be of the opinion that a committee of such an association will not be personally liable on contracts for it, unless they make an express promise, or pledge their individual credit and responsibility, so as thereby to impose a personal obligation upon themselves; or unless it appears that they had funds in their hands and at their disposal to pay for services under the contract. This would seem to state a different rule from that stated in the text, but in this case as the plaintiff was also a member of the association, for which the committee was acting, the latter's nonliability was based rather on the rule that one of several persons jointly concerned in a common purpose cannot maintain an action against all or any of the others for work and labor performed for their joint benefit.

club.⁹² And where one acting for such a society or association seeks to shield himself from personal liability because he made the contract in a representative capacity, it is incumbent on him to establish that fact.⁹³ The members of a committee of a voluntary association are individually liable on a contract made by a subcommittee of their number, under authority delegated by the whole committee, with one who contracted on the credit of the committee personally, and not of the association, although, in making the contract, the subcommittee assumed to act as officers of the association.⁹⁴ Whether credit was extended to the agent alone, or to the club or society, or its members, is generally a question of fact to be determined by the jury, unless the contract is in writing when it is a question of law for the court.

An unincorporated society or club, not being a legal entity in the absence of statute, it cannot, as such, enter into a contract, and it is for this reason that an agent contracting for it is held personally liable on the contract; but there is nothing to prevent the individual members of such society or club from rendering themselves personally responsible as principals, by contracting in the name of the society or club or by authorizing or ratifying such a contract entered into by another for them. This consent of the individual members to become liable on a contract may be given in various ways, as by the constitution or by-laws of such society or club, or by a vote of the members at a meeting in which they all voted or acquiesced.⁹⁵

§ 572. On contract for a fictitious or nonexistent principal.

The same rule applies where an agent enters into a contract, as agent, for a fictitious or nonexistent principal, for if the agent were not held personally responsible in such

⁹² See *Pain v. Sample*, 158 Pa. 428.

⁹³ *Comfort v. Graham*, 87 Iowa, 295.

⁹⁴ *Fendendall v. Taylor*, 23 Wis. 538, 99 Am. Dec. 203.

⁹⁵ *Braithwaite v. Skofield*, 9 Barn. & C. 401; *Fleming v. Hector*, 2 Mees. & W. 172; *Todd v. Emly*, 7 Mees. & W. 427; *Willcox v. Arnold*, 162 Mass. 577; *Ray v. Powers*, 134 Mass. 22; *Heath v. Goslin*, 80 Mo. 310, 50 Am. Rep. 505.

cases the contract would be inoperative.⁹⁶ "Where a contract is signed by one who professes to be signing 'as agent,' but who has no principal existing at the time, and the contract would be altogether inoperative unless binding upon the person who signed it, he is bound thereby; and a stranger cannot by a subsequent ratification relieve him from that responsibility."⁹⁷ Thus, where one, as agent, enters into a contract for another, his alleged principal, whether named or unnamed, and he is in fact the principal, the alleged principal being merely a fictitious one, this fact may be shown and the agent held personally liable on the contract.⁹⁸ So, where a person leases as agent of a company which has no existence, he makes himself personally liable for the rent, when it appears from the evidence that he was the real lessee, and that the business for which the lease was made was his business.⁹⁹

A good illustration of this rule is where the promoters of a projected corporation enter into a contract before its organization, for there is no existing principal at the time the contract is entered into. The liability of the promoters in such cases depends upon the terms of the contract and the intention of the parties. The contract may, of course, expressly stipulate that there shall be no personal responsibility on the promoters, and that the third party shall look only to the corporation, when it is formed;¹⁰⁰ but in the absence of such an understanding, the promoters will be per-

⁹⁶ *Kelner v. Baxter*, L. R. 2 C. P. 174; *Patrick v. Bowman*, 149 U. S. 411; *Washburn v. Frank*, 31 La. Ann. 427; *Codding v. Munson*, 52 Neb. 580, 66 Am. St. Rep. 524; *Learn v. Upstill*, 52 Neb. 271; *De Remer v. Brown*, 165 N. Y. 410; *Heffron v. Pollard*, 73 Tex. 96, 15 Am. St. Rep. 764.

⁹⁷ *Kelner v. Baxter*, L. R. 2 C. P. 174.

⁹⁸ *Adams v. Hall*, 37 Law T. (N. S.) 70; *Rallton v. Hodgson*, 15 East, 67, 4 Taunt. 576, n. (a); *Carr v. Jackson*, 21 Law J. Exch. 137; *Isham v. Burgett*, 157 Mass. 546.

⁹⁹ *Washburn v. Frank*, 31 La. Ann. 427.

¹⁰⁰ *Landman v. Entwistle*, 7 Exch. 632; *Rennie v. Clarke*, 5 Exch. 292; *Whetstone v. Crane Bros. Mfg. Co.*, 1 Kan. App. 320; *Carmony v. Powers*, 60 Mich. 26; *Queen City Furniture & Carpet Co. v. Crawford*, 127 Mo. 356; *In re Heckman's Estate*, 172 Pa. 185. And see *Clark & M. Corp.* § 107.

sonally liable on the contract.¹⁰¹ Thus, the promoters of a corporation are personally liable on a contract for necessary printing made by an attorney employed by them to prepare the papers of incorporation;¹⁰² or for the services of an agent appointed by them to attend the legislature for the purpose of procuring a charter.¹⁰³ Where the promoters of a corporation become thus personally liable on a contract, the subsequent adoption of the contract by the corporation, when organized, does not relieve them from this liability, even though the corporation may thereby become liable, unless the other party consents.¹⁰⁴ But if on the adoption of the contract by the corporation, it is agreed between all the parties that the corporation alone shall be liable, and the promoters released, such release of the promoters is supported by a sufficient consideration, and they cannot thereafter be held liable on the contract.¹⁰⁵

There seems to be an exception to this rule, however, where an agent is authorized to enter into a contract on behalf of an existing principal, and the latter dies without the knowledge of the agent before the contract is entered into. In such a case, the agent is not personally liable on the contract.¹⁰⁶

¹⁰¹ *Kelner v. Baxter*, L. R. 2 C. P. 174; *Bell v. Francis*, 9 Car. & P. 66; *Collingwood v. Berkeley*, 15 C. B. (N. S.) 145; *American Paper Bag Co. v. Van Nortwick*, 52 Fed. 752; *Hersey v. Tully*, 8 Colo. App. 110; *Pratt v. Finkle*, 99 Ga. 616; *Whetstone v. Crane Bros. Mfg. Co.*, 1 Kan. App. 320; *Sproat v. Porter*, 9 Mass. 300; *Carmodity v. Powers*, 60 Mich. 26; *Roberts Mfg. Co. v. Schlick*, 62 Minn. 332; *Johnson v. Corser*, 34 Minn. 355; *Martin v. Fewell*, 79 Mo. 401; *Hurt v. Salisbury*, 55 Mo. 310; *Munson v. Syracuse, G. & C. R. Co.*, 103 N. Y. 58, 76. And see *Clark & M. Corp.* § 107.

¹⁰² *Hersey v. Tully*, 8 Colo. App. 110.

¹⁰³ *Sproat v. Porter*, 9 Mass. 300.

¹⁰⁴ See *Kelner v. Baxter*, L. R. 2 C. P. 174; *Humble v. Hunter*, 12 Q. B. 310; *Queen City Furniture & Carpet Co. v. Crawford*, 127 Mo. 356; *Chapin v. Longworth*, 31 Ohio St. 421; *Clark & M. Corp.* § 107.

¹⁰⁵ *Van Vlieden v. Welles*, 6 Johns. (N. Y.) 85. And see *Case Mfg. Co. v. Soxman*, 138 U. S. 431; *Ennis Cotton-Oil Co. v. Burks* (Tex. Civ. App.) 39 S. W. 966.

¹⁰⁶ *Smout v. Ilbery*, 10 Mees. & W. 1; *Carriger v. Whittington*, 26 Mo. 311, 72 Am. Dec. 212; *Jenkins v. Atkins*, 1 Humph. (Tenn.) 294, 34 Am. Dec. 648.

§ 573. On contract for a foreign principal.

(a) **Former rule.**—It was formerly held that where an agent entered into a contract for a foreign principal, that is one who was a resident in a foreign country, the agent was presumed to contract on his own credit exclusively, and that unless this presumption was rebutted by an agreement, express or implied, to give credit to both principal and agent, or to the principal only, the agent alone was personally liable on the contract, notwithstanding he may have disclosed both the fact of his agency and the name of his principal.¹⁰⁷ And this presumption was considered to be “so strong as almost to amount to a conclusive presumption of law.”¹⁰⁸ This rule seemed to arise “from the consideration, that the merchant abroad and his ability to discharge his obligations may be unknown to those who assume pecuniary responsibility, or make advances, or perform services on his account; the presumption is, that the credit is given exclusively to the foreigner’s agent, unless rebutted by an agreement express or implied; and that the party dealing with the agent intends to trust one, who is known to him and resides in the same

¹⁰⁷ Story, Ag. § 268; *Armstrong v. Stokes*, L. R. 7 Q. B. 598; *Gonzales v. Sladen*, Bull. N. P. 130; *Green v. Kopke*, 18 C. B. 549; *Dramburg v. Pollitzer*, 28 Law T. (N. S.) 470; *Elbinger Actien-Gesellschaft v. Claye*, L. R. 8 Q. B. 313; *Vawter v. Baker*, 23 Ind. 63; *Thorne v. Tait*, 8 La. Ann. 8; *New Castle Mfg. Co. v. Red River R. Co.*, 1 Rob. (La.) 145, 36 Am. Dec. 686; *McKenzie v. Nevius*, 22 Me. 138, 38 Am. Dec. 291; *Rogers v. March*, 33 Me. 106; *Hochster v. Baruch*, 5 Daly (N. Y.) 440; *Merrick’s Estate*, 5 Watts & S. (Pa.) 9.

As was said by Blackburn, J., in *Elbinger Actien-Gesellschaft v. Claye*, L. R. 8 Q. B. 313: “Where a foreigner has instructed English merchants to act for him, I take it that the usage of trade, established for many years, has been that it is understood that the foreign constituent has not authorized the merchants to pledge his credit to the contract, to establish privity between him and the home supplier. On the other hand, the home supplier, knowing that to be the usage, unless there is something in the bargain showing the intention to be otherwise, does not trust the foreigner, and so does not make the foreigner responsible to him, and does not make himself responsible to the foreigner.”

¹⁰⁸ Story, Ag. § 290.

country and subject to the same laws, as himself, rather than trust to one who, if known, cannot, from his residence in a foreign country, be amenable to those laws, and whose ability may be affected by local institutions and local exemptions, which may put at hazard both his rights and his remedies."¹⁰⁹

(b) **Modern rule.**—According to the more modern decisions, however, it is held to be the better rule that there is no presumption in such cases that exclusive credit is given to the agent, but that in any case whether the foreign principal is fully disclosed or not, whether or not exclusive credit is given to the agent, is a question of fact as to the intention of the parties, to be determined from all the facts and circumstances of the case, and the fact that the agent acts for a foreign principal is merely evidence that the agent intended to bind himself, but it must be taken together with other circumstances.¹¹⁰ Thus an agent acting for a foreign principal is not personally liable on a contract of affreightment, the fact of the agency and the name of the principal being disclosed.¹¹¹ So an agent of a foreign mercantile house, who induced a merchant here to make a shipment of goods to his principals, to be sold on commission, and engaged that insurance should be effected either here or in Europe on the property shipped, was not liable for a breach of the agreement to insure.¹¹²

This later rule is so well discussed in a Massachusetts case, that it may be well to give a quotation from the opinion of that case, as rendered by Bigelow, C. J. He, in part, says: "Where goods are sold, it is certainly reasonable to suppose that the vendor trusted to the credit of a person re-

¹⁰⁹ *McKenzie v. Nevius*, 22 Me. 138, 38 Am. Dec. 291. And see *Story*, Ag. § 290.

¹¹⁰ *Green v. Kopke*, 18 C. B. 549; *Armstrong v. Stokes*, L. R. 7 Q. B. 603; *Hutton v. Bullock*, L. R. 9 Q. B. 572; *Ogden v. Hall*, 40 Law T. (N. S.) 751; *Oelricks v. Ford*, 23 How. (U. S.) 49, 65; *Maury v. Ranger*, 38 La. Ann. 485, 58 Am. Rep. 197; *Barry v. Page*, 10 Gray (Mass.) 398; *Goldsmith v. Manheim*, 109 Mass. 187; *Bray v. Kettell*, 1 Allen (Mass.) 80; *Kaulback v. Churchill*, 59 N. H. 296; *Taintor v. Prendergast*, 3 Hill (N. Y.) 72, 38 Am. Dec. 618; *Kirkpatrick v. Stainer*, 22 Wend. (N. Y.) 244.

¹¹¹ *Maury v. Ranger*, 38 La. Ann. 485, 58 Am. Rep. 197.

¹¹² *Kirkpatrick v. Stainer*, 22 Wend. (N. Y.) 244.

siding in the same country with himself, subject to laws with which he is familiar, and to process for the immediate enforcement of a debt, rather than to a principal residing abroad, under a different system of laws, and beyond the jurisdiction of domestic forum. But even in such a case, the fact that the principal is resident in a foreign country is only one circumstance entering into the question of credit and is liable to be controlled by other facts. So in the case of a written contract; it depends on the intention of the parties. But this, as in all other cases of written instruments, must be determined mainly by the terms of the contract. There may be cases where the language of the contract is ambiguous, and it is doubtful to whom the parties intended to give credit, in which the circumstance that the principal is resident abroad may be taken into consideration in determining the question of the liability of the agent. But where the terms of the contract are clear and unambiguous, it must be deemed the final repository of the intention of the parties; and its construction and legal effect cannot be varied or changed by any reference to facts or circumstances affecting the convenience of the parties or the reasonableness of the contract into which they have entered. In such a case, therefore, it makes no difference whether the principal is a foreigner or not. If by the language of the contract the agent and not the principal is bound, such must be its construction; and, on the other hand, if it clearly binds the principal, and is in form a contract with him only, the agent must be exonerated, without regard to the fact that the principal is resident in a foreign country. This rule can work no hardship, because parties can in all cases make their contracts in such form as to bind those to whom they intended to give credit."¹¹⁸

But even if the former rule was considered the better one, it is held that it would not apply to cases in which the parties are residents of two different states of the United States, as they are not considered foreigners in such a sense as to make an agent, resident of one state, personally liable on a con-

¹¹⁸ *Bray v. Kettell*, 1 Allen (Mass.) 80. And see *Kirkpatrick v. Stainer*, 22 Wend. (N. Y.) 244.

tract entered into by him for his principal, resident of another state.¹¹⁴ Nor does it extend to a contract, made in a state here, by one resident here, for personal services to be rendered in a foreign country.¹¹⁵

§ 574. On contracts under seal.

It is a well settled rule of the common law that only those persons can be held liable on a sealed instrument, whose names appear on such instrument or who are sufficiently described therein.¹¹⁶ In accordance with this rule, where an agent makes a contract under seal in his own name, and the terms of the instrument purport to bind him, he will be personally liable on the contract, notwithstanding he may have disclosed the fact of his agency and contracted as such, or even though he discloses his principal's name, but the latter is not made a party to the contract or bound thereby.¹¹⁷ It is not sufficient, to discharge himself from liability, that the agent describes himself in the deed as acting for, and in behalf or as attorney of, the principal, but it should be made to appear that he treated as agent, and actually bound his principal by the deed, for if he does not bind the latter, but

¹¹⁴ *Wawter v. Baker*, 23 Ind. 63; *Barry v. Page*, 10 Gray (Mass.) 398; *Taintor v. Prendergast*, 3 Hill (N. Y.) 72, 38 Am. Dec. 618; *Kirkpatrick v. Stainer*, 22 Wend. (N. Y.) 244; *Barham v. Bell*, 112 N. C. 131.

¹¹⁵ *Rogers v. March*, 33 Me. 106.

¹¹⁶ *Beckham v. Drake*, 9 Mees. & W. 79; *Sanders v. Partridge*, 108 Mass. 556; *Briggs v. Partridge*, 64 N. Y. 357, 21 Am. Rep. 617; *Kiersted v. Orange & A. R. Co.*, 69 N. Y. 343, 25 Am. Rep. 199; *Taft v. Brewster*, 9 Johns. (N. Y.) 334, 6 Am. Dec. 280; and many other cases.

¹¹⁷ *Appleton v. Binks*, 5 East, 148; *Hancock v. Hodgson*, 12 Moore, 504; *Cass v. Rudele*, 2 Vern. 280; *Hall v. Cockrell*, 28 Ala. 513; *Henderson v. Martin*, 19 Ark. 477, 70 Am. Dec. 606; *Mitchell v. Hazen*, 4 Conn. 495, 10 Am. Dec. 169; *Stinchfield v. Little*, 1 Me. 231, 10 Am. Dec. 65; *Harper v. Little*, 2 Me. 14, 11 Am. Dec. 25; *Einstein v. Holt*, 52 Mo. 340; *Morgan v. Bergen*, 3 Neb. 209; *Dayton v. Warne*, 43 N. J. Law, 659; *Stone v. Wood*, 7 Cow. (N. Y.) 453, 17 Am. Dec. 529; *Briggs v. Partridge*, 64 N. Y. 357, 21 Am. Rep. 617; *Taft v. Brewster*, 9 Johns. (N. Y.) 334, 6 Am. Dec. 280; *Quigley v. DeHaas*, 82 Pa. 267; *Bellas v. Hays*, 5 Serg. & R. (Pa.) 427, 9 Am. Dec. 385; *Steele v. McElroy*, 1 Sneed (Tenn.) 341.

signs his own name and seal, such expressions are but designation personae, it is his own act and deed, and he is bound personally.¹¹⁸ The whole question in such cases is one of intention, to be determined from the face of the instrument. Was the instrument executed and sealed in such a manner that it binds the principal alone, or does it purport to be binding on the agent only? This question has been considered in a former chapter in treating of "execution of authority."¹¹⁹ When it is once determined from the rules there set forth that the contract was executed and sealed by the agent alone, and in fact purports to be his contract, he alone is bound thereby.

— **Public agents.** Where, however, such a contract is entered into by a duly authorized public agent, on behalf of the government, and the fact so appears, notwithstanding the agent may have affixed his own name and seal, it is the contract of the government, who alone is liable, and not of the agent.¹²⁰

§ 575. On negotiable instruments.

(a) **In general.**—It is also a well settled rule that only such persons are liable on a negotiable instrument as are named or described therein; or in other words a negotiable instrument is binding on the person only by whom it is signed. If an agent is authorized to make, draw, accept, or indorse a negotiable bill or note, in order that it may be binding on the principal, he must either sign the principal's name, or must make it appear in some way from the face of the instrument that it was executed for him; and if instead of doing so he, innocently or intentionally, makes it appear that he himself is the party to the instrument, it will be binding on him

¹¹⁸ *Stinchfield v. Little*, 1 Me. 231, 10 Am. Dec. 65; *Fowler v. Shearer*, 7 Mass. 14; *Tucker v. Bass*, 5 Mass. 164; *Taft v. Brewster*, 9 Johns. (N. Y.) 334, 6 Am. Dec. 280; and see cases cited note 117, *supra*.

¹¹⁹ *Ante*, §§ 293-309.

¹²⁰ *Stinchfield v. Little*, 1 Me. 231, 10 Am. Dec. 65; and see *post*, § 576.

alone.¹²¹ When therefore an agent makes, indorses, or accepts a negotiable instrument in his own name, he is personally liable thereon, although he may have acted in good faith and may have disclosed the fact of his agency or the name of his principal; and parol evidence is inadmissible for the purpose of charging another or relieving the agent from liability on such instrument.¹²² And this is true notwithstanding a request to charge the bill or note to a particular account, and although the payee knows the maker, acceptor or indorser to be an agent.¹²³

(b) **Statutory provisions.**—Nor is this rule abrogated by any statutory provisions touching the responsibility of principals upon contracts made and executed by their authorized agents. Even if those provisions should be held to apply to any contracts not purporting on their face to be made by the agent for or in behalf of the principal, it is one thing to extend a liability to a real party in interest, and afford a remedy against him, and quite a different thing to discharge the liability expressly assumed and incurred by him who has

¹²¹ *Tucker Mfg. Co. v. Fairbanks*, 98 Mass. 101; and see ante, §§ 310-330.

¹²² *Eaton v. Bell*, 5 Barn. & Ald. 34; *Leadbitter v. Farrow*, 5 Maule & S. 345; *Price v. Taylor*, 5 Hurl. & N. 540; *Jones v. Jackson*, 22 Law T. (N. S.) 828; *Hobson v. Hassett*, 76 Cal. 203, 9 Am. St. Rep. 193; *Tannatt v. Rocky Mountain Nat. Bank*, 1 Colo. 278, 9 Am. Rep. 156; *Burlingame v. Brewster*, 79 Ill. 515, 22 Am. Rep. 177; *Hypes v. Griffin*, 89 Ill. 134, 31 Am. Rep. 71; *Sturdivant v. Hull*, 59 Me. 172, 8 Am. Rep. 409; *Rendell v. Harriman*, 75 Me. 497, 46 Am. Rep. 421; *Newhall v. Dunlap*, 14 Me. 180, 31 Am. Dec. 45; *Davis v. England*, 141 Mass. 587; *Stackpole v. Arnold*, 11 Mass. 27, 6 Am. Dec. 150; *Williams v. Robbins*, 16 Gray (Mass.) 77, 77 Am. Dec. 396; *Fowler v. Atkinson*, 6 Minn. 578; *Sparks v. Dispatch Transfer Co.*, 104 Mo. 531, 24 Am. St. Rep. 351; *Hills v. Bannister*, 8 Cow. (N. Y.) 31; *Bank of Rochester v. Monteath*, 1 Denio (N. Y.) 402, 43 Am. Dec. 681; *Pentz v. Stanton*, 10 Wend. (N. Y.) 271, 25 Am. Dec. 558; *Cortland Wagon Co. v. Lynch*, 82 Hun (N. Y.) 173; *Collins v. Buckeye State Ins. Co.*, 17 Ohio St. 215, 93 Am. Dec. 612; *Bank v. Cook*, 38 Ohio St. 442; *Robinson v. Kanawha Valley Bank*, 44 Ohio St. 441, 58 Am. Rep. 829; *Bank of Hamburg v. Wray*, 4 Strob. (S. C.) 87, 51 Am. Dec. 659 (indorsing); *Tarver v. Garlington*, 27 S. C. 107, 13 Am. St. Rep. 628; *Arnold v. Sprague*, 34 Vt. 402.

¹²³ *Newhall v. Dunlap*, 14 Me. 180, 31 Am. Dec. 45.

made himself a party to the contract. These provisions, therefore, are not to be considered as applying to negotiable paper in such a way as to make parol evidence of the understanding and intention of the parties admissible to relieve an agent who has, on the face of the paper, expressly assumed the liability himself.¹²⁴

(c) **In principal's name.**—But if he acts and signs in the name of his principal in making the note or bill he cannot be held personally liable thereon.¹²⁵ The important question in this connection is to ascertain when a negotiable instrument is so made as to be binding upon the agent only. When is the instrument so signed that it is the signature of the agent alone and not of his principal? This is a matter of intention which is often difficult of determination, and which is to be determined from the face of the instrument without the aid of parol evidence, unless the face of the instrument shows an ambiguity as to who was intended to be bound, in which case parol evidence of such intention may be admitted. Parol evidence may also be admitted to show that the principal does business under the name of the agent, and that although the instrument was signed in the agent's name, it was the name under which the principal does business, and in fact was his obligation.

(d) **Determination of execution.**—These questions as to when a negotiable instrument is executed in an agent's name and is therefore binding on him alone, have been fully considered in a former chapter, in treating of the execution of authority.¹²⁶ If it is determined from the rules there set forth that the signature to the negotiable instrument is that of the principal, or it was the intention of the instrument to bind him alone, he alone will be bound and the agent will be relieved from any liability on the instrument.¹²⁷ If on

¹²⁴ *Sturdivant v. Hull*, 59 Me. 172, 8 Am. Rep. 409 (construing Rev. St. 1857, c. 73, § 15; c. 1, § 4, clause 21); *Rendell v. Harriman*, 75 Me. 497, 46 Am. Rep. 421.

¹²⁵ *Wilson v. Barthrop*, 2 Mees. & W. 863; *Piercy v. Hedrick*, 2 W. Va. 458, 98 Am. Dec. 774; and see ante, § 310 et seq.

¹²⁶ Ante, §§ 310-330.

¹²⁷ See ante, §§ 310-330.

the other hand it is determined that the signature is unequivocally that of the agent alone, or it was the intention of the instrument to bind him alone, he alone will be bound thereby.¹²⁸

These rules do not, however, as a general rule, apply to public agents who make, accept, or indorse negotiable instruments on behalf of the government.¹²⁹

(e) **Where signing is unauthorized.**—Previous to the negotiable instruments law, it was held that where an agent signed his principal's name to such an instrument without authority, the agent was personally liable in an action of general assumpsit,¹³⁰ or in a special action on the case.¹³¹ But the negotiable instruments law provides that where the instrument shows either in the body thereof, or by means of words added after the signature, that it was signed for or on behalf of a principal, or in a representative capacity, the signer is not personally liable if he is duly authorized; but the mere addition of words describing the signer as an agent, or as acting in a representative capacity, without disclosing his principal, will not relieve the signer from personal liability.¹³² From this provision it would seem to fol-

¹²⁸ See ante, §§ 310-330.

¹²⁹ See post, § 576.

¹³⁰ *Rossiter v. Rossiter*, 8 Wend. (N. Y.) 494, 24 Am. Dec. 62; *Frankland v. Johnson*, 147 Ill. 520, 37 Am. St. Rep. 234; *Bank of Hamburg v. Wray*, 4 Strob. (S. C.) 87, 51 Am. Dec. 659; *Edings v. Brown*, 1 Rich. Law (S. C.) 255. As was said in this case: "If one sign a note or indorse a bill as agent, when he is not agent, he is personally liable although he do so bona fide, and does no other act to deceive or mislead the person with whom he deals, except by the assumption of agency when he is not agent."

But in *Dusenbury v. Ellis*, 3 Johns. Cas. (N. Y.) 70, 2 Am. Dec. 144, where a person signed a note in the name of another, as the attorney of the latter, but having no authority from him for that purpose, he was held personally liable on the note to the party who had accepted it under such mistake or imposition.

¹³¹ *Long v. Colburn*, 11 Mass. 97, 6 Am. Dec. 160; *Ballou v. Talbot*, 16 Mass. 461, 8 Am. Dec. 146.

¹³² See Neg. Inst. Laws of Colorado; Connecticut; District of Columbia; Florida; Iowa; Maryland; Massachusetts; New York; North Carolina; North Dakota; Oregon; Rhode Island; Tennessee; Utah; Virginia; Washington; Wisconsin, etc.

low that where such an instrument is executed by an agent, for or on behalf of a principal, without due authority, he is personally liable directly upon the instrument itself.¹³³ But as this controverts the common-law rule of permitting only such person to be liable upon a negotiable instrument as appears bound upon its face, it has been suggested that this law be amended by striking out the words "if he was duly authorized."¹³⁴

§ 576. Liability of public agents on contracts on behalf of the government.

(a) **In general.**—The rules that have been considered in the preceding sections are the ones applicable to cases of private agency; but when we come to consider cases of public agency, the rules applicable thereto are found to be different. Where a public agent enters into a contract on behalf of his principal, the presumption is that he did not intend to bind himself personally by the contract, but that his intention was to bind the government only, although he may have contracted in his own name. It is also presumed, in such cases, that the other contracting party did not intend to rely upon the individual responsibility of the agent, but rather upon that of his principal.

It is a general rule, therefore, that where a public agent enters into a contract in his official capacity, on behalf of his principal, he is not personally liable thereon, even though the contract is executed in such a manner that if the agency were a private one, the agent would be personally bound.¹³⁵ "Great public inconvenience would result from

¹³³ *Chipman v. Foster*, 119 Mass. 189.

¹³⁴ See 16 Harv. Law Rev. 256, citing a number of authorities against this doctrine.

¹³⁵ *Macbeath v. Haldimand*, 1 Term R. 172; *Palmer v. Hutchinson*, 6 App. Cas. 619; *New York & C. S. S. Co. v. Harrison*, 16 Fed. 688; *Parks v. Ross*, 11 How. (U. S.) 362; *Jones v. LeTombe*, 3 Dall. (U. S.) 384; *Hodgson v. Dexter*, 1 Cranch (U. S.) 345; *Dwinelle v. Henriquez*, 1 Cal. 387; *Adams v. Whittlesey*, 3 Conn. 560; *Ogden v. Raymond*, 22 Conn. 379, 58 Am. Dec. 429; *Yulee v. Canova*, 11 Fla. 9; *Ghent v. Adams*, 2 Ga. 214; *Sparta School Township v. Mendell*, 138 Ind. 188; *Murray v. Carothers*, 1 Metc. (Ky.) 71;

a different doctrine, considering the various public functionaries which the government must employ, in order to transact its ordinary business and operations; and many persons would be deterred from accepting important offices of trust under the government, if they were held personally liable upon all their official contracts."¹⁸⁶ Nor will it make any difference if the promise was given or the services were performed at the special instance and request of the person so acting as agent; for although, in common and ordinary cases, the law implies a promise and personal obligation as necessarily resulting from services performed on request, yet such implication never arises where it appears that the request was made by a public agent acting in a public concern.¹⁸⁷

A school trustee deriving his official character from general law and the election of the people of a given district is as much a public agent as if he were the immediate agent of the state or of one of its political divisions, and as such is not personally liable to a school teacher for services rendered in teaching a school at the request of the defendant.¹⁸⁸ So a public agent in his known official capacity, employing a man to labor on government work, cannot be held personally lia-

Freeman v. Otis, 9 Mass. 272, 6 Am. Dec. 66; *Brown v. Austin*, 1 Mass. 208, 2 Am. Dec. 11; *Dawes v. Jackson*, 9 Mass. 490; *Bainbridge v. Downie*, 6 Mass. 253; *Simonds v. Heard*, 23 Pick. (Mass.) 120, 34 Am. Dec. 41; *Sanborn v. Neal*, 4 Minn. 126, 77 Am. Dec. 502; *Copes v. Matthews*, 10 Smedes & M. (Mass.) 398; *Tutt v. Hobbs*, 17 Mo. 486; *Reed v. Conway*, 26 Mo. 13; *Walker v. Swartwout*, 12 Johns. (N. Y.) 444, 7 Am. Dec. 334; *Fox v. Drake*, 8 Cow. (N. Y.) 191; *Osborne v. Kerr*, 12 Wend. (N. Y.) 179; *Nichols v. Moody*, 22 Barb. (N. Y.) 611; *Tucker v. Justices of Iredell County*, 35 N. C. (13 Ired.) 434; *Hammaraskold v. Bull*, 11 Rich. Law (S. C.) 493; *Miller v. Ford*, 4 Rich. Law (S. C.) 376, 55 Am. Dec. 687; *Enloe v. Hall*, 1 Humph. (Tenn.) 303.

¹⁸⁶ *Story, Ag.* § 302; *Miller v. Ford*, 4 Rich. Law (S. C.) 376, 55 Am. Dec. 687.

¹⁸⁷ *Brown v. Austin*, 1 Mass. 208, 2 Am. Dec. 11.

¹⁸⁸ *Ogden v. Raymond*, 22 Conn. 379, 58 Am. Dec. 429; *Adams v. Whittlesey*, 3 Conn. 564; *Sanborn v. Neal*, 4 Minn. 126, 77 Am. Dec. 502; *Hodgson v. Dexter*, 1 Cranch (U. S.) 345; *Olney v. Wickes*, 18 Johns. (N. Y.) 124; *Allen v. School District*, 15 Pick. (Mass.) 35.

ble for the wages of the party so employed.¹³⁹ So an action on the promise of an army officer in his official capacity to pay a reward for apprehending a deserter cannot be maintained.¹⁴⁰ But where it does not appear that an agent, in making a contract, acted expressly or ostensibly as a public agent, it will be deemed a private contract.¹⁴¹ A public administrator of a county is held not to be a public agent within the meaning of this rule.¹⁴²

(b) When public agent is personally bound.—But although this is the general rule, it is founded, as has been seen above, on a mere presumption which may be rebutted by evidence tending to show that the agent clearly intended to bind himself personally, and that the other party to the contract relied upon his personal responsibility; but it is incumbent upon the person thus seeking to hold such an agent personally liable to show by clear proof that such was the intention of the parties.¹⁴³ “A person acting as a public agent may contract with an individual in such a manner as to make himself personally liable; but the facts and circumstances must, in such cases,

¹³⁹ *Walker v. Swartwout*, 12 Johns. (N. Y.) 444, 7 Am. Dec. 334. A collector of customs of the United States government is not, in the absence of an express promise to pay, liable for the wages of a person employed by him as night watch and oarsman. *Nichols v. Moody*, 22 Barb. (N. Y.) 611.

¹⁴⁰ *Belknap v. Reinhart*, 2 Wend. (N. Y.) 375, 20 Am. Dec. 621.

¹⁴¹ *Swift v. Hopkins*, 13 Johns. (N. Y.) 313.

¹⁴² *Dwinelle v. Henriquez*, 1 Cal. 387.

¹⁴³ *Clutterbuck v. Coffin*, 3 Man. & G. 842; *Auty v. Hutchinson*, 6 C. B. 266; *Macbeath v. Haldimand*, 1 Term R. 177; *New York & C. S. S. Co. v. Harbison*, 16 Fed. 688; *Parks v. Ross*, 11 How. (U. S.) 362; *Jones v. LeTombe*, 3 Dall. (U. S.) 384; *Anderson v. Pearce*, 36 Ark. 293, 38 Am. Rep. 39; *Johnson v. Common Council*, 16 Ind. 227; *Murray v. Carothers*, 1 Metc. (Ky.) 71; *Brown v. Bradlee*, 156 Mass. 28, 32 Am. St. Rep. 430; *Sanborn v. Neal*, 4 Minn. 126, 77 Am. Dec. 502; *Copes v. Matthews*, 10 Smedes & M. (Miss.) 398; *McClenticks v. Bryant*, 1 Mo. 598, 14 Am. Dec. 310; *Stone v. Wood*, 7 Cow. (N. Y.) 453, 17 Am. Dec. 529, 531; *Nichols v. Moody*, 22 Barb. (N. Y.) 611; *Sheffield v. Watson*, 3 Caines (N. Y.) 69; *Osborne v. Kerr*, 12 Wend. (N. Y.) 179; *Tucker v. Justices of Iredell County*, 35 N. C. (13 Ired.) 434; *Miller v. Ford*, 4 Rich. Law (S. C.) 376, 55 Am. Dec. 687; *McCurdy v. Rogers*, 21 Wis. 197, 91 Am. Dec. 468.

show the contract to be very special, and that the party gave the credit to, or performed the labor for, the individual alone, and on his promise and agreement to pay; or the fact of his being a public agent must be unknown, and must not be disclosed at the time of making the contract. The great inquiry in such cases is, to whom was credit intended to be given?"¹⁴⁴ Even an express promise to pay is not always the criterion; but much depends upon the question whether the agent intended to make himself personally liable.¹⁴⁵ It is a question of fact for the jury in such cases to determine to whom credit is given.¹⁴⁶ Thus, an offer or promise to the effect that a sum specified will be paid to any person furnishing evidence which will lead to the arrest and conviction of a certain person, and signed, "Selectmen of Milton," is a personal promise of the persons so signing it, especially if they did not, in their official capacity, have authority to bind the town of which they were selectmen.¹⁴⁷ So public agents may personally bind themselves if they make contracts beyond their authority.¹⁴⁸

A public agent would also be personally liable, if he should deny to the government that he had entered into such contract, and by such interference enforce his remedy against the government, as, by his conduct, he has in effect disavowed his acting in the character of a public agent.¹⁴⁹

(c) **Contracts within these rules.**—These rules apply not only to simple contracts, other than negotiable instruments, but also to sealed instruments and negotiable paper, for the presumption that a public agent does not intend to bind himself applies as well in these cases as in simple contracts. Hence if a public agent, whilst acting in his official capacity

¹⁴⁴ *Nichols v. Moody*, 22 Barb. (N. Y.) 611.

¹⁴⁵ *Walker v. Swartwout*, 12 Johns. (N. Y.) 444, 7 Am. Dec. 334; *Nichols v. Moody*, 22 Barb. (N. Y.) 611; *Osborne v. Kerr*, 12 Wend. (N. Y.) 179.

¹⁴⁶ *Auty v. Hutchinson*, 6 C. B. 266; *Brown v. Rundlett*, 15 N. H. 360; *Hammariskold v. Bull*, 9 Rich. Law (S. C.) 484.

¹⁴⁷ *Brown v. Bradlee*, 156 Mass. 28, 32 Am. St. Rep. 430.

¹⁴⁸ *Post*, § 589.

¹⁴⁹ *Freeman v. Otis*, 9 Mass. 272, 6 Am. Dec. 66.

and in performance of his official duties, makes a sealed contract.¹⁵⁰ or negotiable instrument,¹⁵¹ on behalf of the government, he will not be bound thereby, although he affixes his own name or seal to it, unless there is clear proof showing an intention on his part to become personally bound. Thus, a sealed contract by persons describing themselves as members of a township committee, and binding themselves and their successors in office, although signed by them as individuals, does not bind them individually.¹⁵² So a negotiable note made by school trustees, for the purposes of their office, and purporting to be their individual obligation, but with the addition to their signatures of their official description, is binding upon the school corporation, and not upon the trustees individually.¹⁵³ In some cases, however, it is held that where there is nothing in the body of a negotiable instrument indicating that it was executed by the public agent, in his official capacity, the mere fact that he adds to his signature words indicating his official capacity does not relieve him from personal liability on the instrument, and hence, in that respect, overlooking or not recognizing the distinction between public and private agents.¹⁵⁴ But there seems to be no reason why it should not apply in such cases, as well as in other cases of public agents or on other contracts.¹⁵⁵

It has been held that this distinction between the liability

¹⁵⁰ *Macbeath v. Haldimand*, 1 Term R. 172; *Unwin v. Wolseley*, 1 Term R. 674; *Hodgson v. Dexter*, 1 Cranch (U. S.) 345; *Murray v. Carothers*, 1 Metc. (Ky.) 71; *Stinchfield v. Little*, 1 Me. 231, 10 Am. Dec. 65; *Knight v. Clark*, 48 N. J. Law, 22, 57 Am. Rep. 534; *Randall v. Van Vechten*, 19 Johns. (N. Y.) 60, 10 Am. Dec. 193.

¹⁵¹ *School Town of Monticello v. Kendall*, 72 Ind. 91, 37 Am. Rep. 139; *Hodges v. Runyon*, 30 Mo. 491.

¹⁵² *Knight v. Clark*, 48 N. J. Law, 22, 57 Am. Rep. 534.

¹⁵³ *School Town of Monticello v. Kendall*, 72 Ind. 91, 37 Am. Rep. 139.

¹⁵⁴ *Wing v. Glick*, 56 Iowa, 473, 41 Am. Rep. 118; *Fowler v. Atkinson*, 6 Minn. 579; *Trustees of Schools of Cahokia v. Rautenberg*, 88 Ill. 219.

¹⁵⁵ *School Town of Monticello v. Kendall*, 72 Ind. 91, 37 Am. Rep. 139; *Pine Civil Tp. v. Huber Mfg. Co.*, 83 Ind. 121; *Wallis v. Johnson School Tp.*, 75 Ind. 368; *Sanborn v. Neal*, 4 Minn. 126, 77 Am. Dec. 502; *McClellan v. Reynolds*, 49 Mo. 312.

of public and private agents does not apply to contracts made by officers of municipal corporations, which can contract for themselves and be sued on their contracts.¹⁵⁶

B. On Unauthorized Contracts.

§ 577. In general.

If a person falsely, whether knowingly or through mistake, assumes to act as agent for another, and enters into a contract in his name, or if an agent enters into a contract which is not within the scope of either his actual or apparent authority, and the contract is not ratified by the principal, all of the courts agree that the agent is personally liable to the other party, in some form of action, for the loss sustained by reason of his wrongful assumption and representation of authority. Or as the rule is often stated, if an agent acts without or in excess of his authority, so that his principal is not bound, he will himself be liable for the damages thus occasioned to the other contracting party, although he may have been innocent of any intention to defraud,¹⁵⁷ provided the other party did not know of his want of authority;¹⁵⁸ but the courts do not agree as to the remedy of the other party.¹⁵⁹ The agent may, of course, when entering into a contract on behalf of another, expressly agree with the other contracting party that he will not be personally responsible for any lack of authority, and in such a case he could not be held personally liable if the contract is unauthorized.¹⁶⁰ The mere

¹⁵⁶ *Providence v. Miller*, 11 R. I. 272, 23 Am. Rep. 453; *Hall v. Cockrell*, 28 Ala. 507; *Brown v. Bradlee*, 156 Mass. 28, 32 Am. St. Rep. 430; *Simonds v. Heard*, 23 Pick. (Mass.) 120, 34 Am. Dec. 41.

¹⁵⁷ *Polhill v. Walter*, 3 Barn. & Adol. 114; *Collen v. Wright*, 8 El. & Bl. 647; *Halbot v. Lens* [1901] 1 Ch. 344; *Dale v. Donaldson Lumber Co.*, 48 Ark. 188, 3 Am. St. Rep. 224; *Noyes v. Loring*, 55 Me. 408; *Dusenbury v. Ellis*, 3 Johns. Cas. (N. Y.) 70, 2 Am. Dec. 144; *Baltzen v. Nicolay*, 53 N. Y. 467; *Kroeger v. Pitcairn*, 101 Pa. 311, 47 Am. Rep. 718; and other cases cited in the notes following.

¹⁵⁸ *Halbot v. Lens* [1901] 1 Ch. 344; *Hall v. Lauderdale*, 46 N. Y. 70; *Michael v. Jones*, 84 Mo. 578.

¹⁵⁹ See post, §§ 585, 586.

¹⁶⁰ *Lilly v. Smales* [1892] 1 Q. B. 456; *Ogden v. Raymond*, 22 Conn. 379, 58 Am. Dec. 429; *McCurdy v. Rogers*, 21 Wis. 197, 91 Am. Dec. 468.

want of authority in an agent to bind the person for whom he assumes to act does not render him individually liable, where the facts and circumstances indicate that no such liability was intended by either of the parties.¹⁶¹

These questions may arise under various circumstances, but they most generally arise where the agent makes an unauthorized contract, (1) when he knows that he is unauthorized, (2) when he acts without any authority bona fide believing he has such, and (3) when he bona fide acts in excess of his authority.¹⁶² All the cases in which the agent has been held personally responsible for an authorized contract will be found to arrange themselves under one or the other of these classes. In all of them it will be found that in order to make an agent personally liable where he did not intend to become so, and credit was not given to him personally, he must either have been guilty of some fraud, made some statements which he knew to be false, or stated as true what he did not know to be true, omitting at the same time to give such information to the other contracting party as would enable him equally with himself to judge as to the authority under which he proposed to act.¹⁶³

§ 578. Where agent knows he is unauthorized.

Where an agent knows that he has no authority to enter into a contract for an assumed principal, his liability in respect thereto may arise (1) upon an express representation that he possesses the authority necessary to enter into such contract, or (2) upon an implied representation that he possesses such authority.

If he expressly represents that he has the requisite author-

¹⁶¹ *Michael v. Jones*, 84 Mo. 578.

¹⁶² The cases have also been sometimes classified as follows: "(1) Where the agent makes a false representation of his authority with intent to deceive; (2) where, with knowledge of his want of authority, but without intending any fraud, he assumes to act as though he were fully authorized; and (3) where he undertakes to act bona fide, believing he has authority, but in fact has none" *Kroeger v. Pitcairn*, 101 Pa. 311, 47 Am. Rep. 718.

¹⁶³ *Smout v. Ilbery*, 10 Mees. & W. 1; *McCurdy v. Rogers*, 21 Wis. 197, 91 Am. Dec. 468; *Halbot v. Lens* [1901] 1 Ch. 344.

ity to enter into the contract in question on behalf of the assumed principal, when in fact he knows that he has not, it is evident that there is an intention on his part to deceive the other party and to induce him to enter into the contract, and consequently he will be personally liable to such party for any injury suffered by the latter by being thus deceived and misled.¹⁶⁴ He induces the other party to enter into a contract on what amounts to a misrepresentation of a fact peculiarly within his own knowledge, and it is but just that he who does so should be considered as holding himself out as one having competent authority to contract, and as guaranteeing the consequences arising from any want of such authority.¹⁶⁵ Thus, where a son represents himself to be the agent to sell his father's estate, whereas in fact he is not, and in such capacity accepts from a third party a bona fide bid to buy the property, which he fails to have carried out, he is personally liable to such third person, who made or procured the bid to be made, in such sum as would be a reasonable compensation for his services in negotiating the same.¹⁶⁶ So a person who signs a release of liens, falsely representing that he has authority to do so from the owner of the liens, is liable in damages to a person purchasing the property on the faith of the release.¹⁶⁷

And this is also true where, although he makes no express representation as to his authority, yet contracts with the third party in such a manner as to impliedly represent that he possesses the requisite authority. If he contracts

¹⁶⁴ *Smout v. Ilbery*, 10 Mees. & W. 1; *Beattie v. Ebury*, 7 Ch. App. 777; *Collen v. Wright*, 8 El. & Bl. 647; *Ware v. Morgan*, 67 Ala. 468; *Levy v. Lane*, 38 La. Ann. 252; *Richie v. Bass*, 15 La. Ann. 668; *Duffy v. Mallinkrodt*, 81 Mo. App. 449; *Weare v. Gove*, 44 N. H. 196; *New York Bank Note Co. v. McKeige*, 31 App. Div. (N. Y.) 188; *Parker v. Knox*, 60 Hun (N. Y.) 550; *Noe v. Gregory*, 7 Daly (N. Y.) 283; *Farmers' Co-operative Trust Co. v. Floyd*, 47 Ohio St. 525, 21 Am. St. Rep. 846; *Kroeger v. Pitcairn*, 101 Pa. 311, 47 Am. Rep. 718; *Lane v. Corr*, 156 Pa. 250; *Luttrell v. White* (Tenn. Ch. App.) 42 S. W. 61; *McReavy v. Eshelman*, 4 Wash. 760.

¹⁶⁵ *Smout v. Ilbery*, 10 Mees. & W. 1.

¹⁶⁶ *Duffy v. Mallinkrodt*, 81 Mo. App. 449.

¹⁶⁷ *Lane v. Corr*, 156 Pa. 250.

with the third party in such a manner as to impliedly hold himself out as having authority to make the contract on behalf of another, when in fact he knows that he is not authorized to do so, he will be personally liable for all injuries suffered by the other party by reason of such representations.¹⁶⁸

§ 579. Where agent bona fide acts without any authority.

The same rule applies where the ostensible agent acts without any authority, bona fide believing that he has authority to make the contract in question. If the agent has acted without any authority whatever, the mere fact that he did so in good faith, believing that he possessed the requisite authority, does not relieve him from liability to a third party who has been injured thereby. Hence, where an agent, without authority, enters into a contract on behalf of an assumed principal, expressly representing that he has authority to do so, and bona fide believing he has such, he will be personally responsible to such party by reason of his being deceived and misled by the agent's representations.¹⁶⁹ In

¹⁶⁸ Polhill v. Walter, 3 Barn. & Adol. 114; Randell v. Trimen, 18 C. B. 786; Dale v. Donaldson Lumber Co., 48 Ark. 188, 3 Am. St. Rep. 224; Charles v. Eshleman, 5 Colo. 107; Frankland v. Johnson, 147 Ill. 520, 37 Am. St. Rep. 234; Levy v. Lane, 38 La. Ann. 252; Hewitt v. Roudebush, 24 La. Ann. 254; Keener v. Harrod, 2 Md. 70, 56 Am. Dec. 706; Solomon v. Penoyor, 89 Mich. 11; Woodes v. Dennett, 9 N. H. 55; White v. Madison, 26 N. Y. 117; Simmons v. More, 100 N. Y. 140; Farmers' Co-operative Trust Co. v. Floyd, 47 Ohio St. 525, 21 Am. St. Rep. 846; Kroeger v. Pitcairn, 101 Pa. 311, 47 Am. Rep. 718; Lasher v. Stimson, 145 Pa. 30; Clark v. Foster, 8 Vt. 98.

Assuming to act as agent of a foreign corporation in a state, knowing that he was not authorized to do so, and in violation of a statute, makes him personally liable to the person with whom he dealt for or on account of his principal; and the penalty prescribed by statute for violating it is not his only liability, but it is in addition to his common-law responsibility to the person with whom he unlawfully dealt. Lasher v. Stimson, 145 Pa. 30.

¹⁶⁹ Smout v. Ilbery, 10 Mees. & W. 1; Bartlett v. Tucker, 104 Mass. 336, 6 Am. Rep. 240; Jefts v. York, 10 Cush. (Mass.) 392; Kroeger v. Pitcairn, 101 Pa. 311, 47 Am. Rep. 718; Hamburg Bank v. Wray, 4 Strob. (S. C.) 87, 51 Am. Dec. 659.

these cases, it is true, the agent is not actuated by any fraudulent motives, nor has he made any statement which he knows to be untrue. But still his liability depends on the same principles as above. It is a wrong different in moral degree only, but not in its essence, from the case stated in the preceding section, to state as true what he does not know to be true, even though he does not know it to be false, but believes, without sufficient grounds, that the statement will ultimately turn out to be true. And if that wrong produces injury to a third person, who is wholly ignorant of the grounds on which such belief of the supposed agent is founded, and who has relied on the correctness of his assertion, it is just that he who makes such assertion should be personally liable for its consequences.¹⁷⁰

And the same is true where he bona fide acts without authority, believing himself to have such, although he makes no express representation as to his authority. There is, in such cases, an implied representation on his part that he possesses the requisite authority, and the fact that he acted in good faith, but erroneously, does not relieve him from liability for damages caused to the other party, any more than it does not do so where he makes express representations as to his authority.¹⁷¹ By acting as agent for another, when he is not, though he thinks he is, he tacitly and impliedly represents himself authorized, without knowing the fact to be true, and it is in the nature of a false warranty, upon which he is liable.¹⁷²

This rule is clearly a just one, for however innocent the agent may have been of any actual wrong, his acts have been

¹⁷⁰ *Smout v. Ilbery*, 10 Mees. & W. 1.

¹⁷¹ *Richardson v. Williamson*, L. R. 6 Q. B. 276; *Randell v. Trimen*, 18 C. B. 786; *Ware v. Morgan*, 67 Ala. 468; *Mendenhall v. Stewart*, 18 Ind. App. 262; *Rice v. Western Fuse & Explosives Co.*, 64 Ill. App. 603; *Jefts v. York*, 4 Cush. (Mass.) 371, 50 Am. Dec. 791; *Bartlett v. Tucker*, 104 Mass. 336, 6 Am. Rep. 240; *Farmers' Co-operative Trust Co. v. Floyd*, 47 Ohio St. 525, 21 Am. St. Rep. 846; *Kroeger v. Pitcairn*, 101 Pa. 311, 47 Am. Rep. 718; *Bank of Hamburg v. Wray*, 4 Strob. (S. C.) 87, 51 Am. Dec. 659; *McCurdy v. Rogers*, 21 Wis. 197, 91 Am. Dec. 468.

¹⁷² *Jefts v. York*, 10 Cush. (Mass.) 392.

the cause of loss to another, who is also innocent, and it is more equitable and just that the agent whose acts have caused the loss should be liable therefor rather than that the third party should suffer. "The fact that the professed agent honestly thinks that he has authority affects the moral character of his act; but his moral innocence, so far as the person whom he has induced to contract is concerned, in no way aids such person or alleviates the inconvenience and damage which he sustains. The obligation which arises in such a case is well expressed by saying that a person, professing to contract as agent for another, impliedly, if not expressly, undertakes to or promises the person who enters into such contract, upon the faith of the professed agent being duly authorized, that the authority which he professes to have does in point of fact exist."¹⁷³ Thus, one making, accepting, or indorsing a bill or note as agent when he is not such, is liable personally, although he does so bona fide.¹⁷⁴ So where an agent, without authority, signs his principal's name to a bill of credit, though he bona fide believed he had such authority, he is personally responsible to one who acts in reliance thereon.¹⁷⁵

¹⁷³ Willes, J., in *Collen v. Wright*, 8 El. & Bl. 647.

And as was said in *Weare v. Gove*, 44 N. H. 196: "Although no fraud or wrongful motive can be imputed to the agent, still his act is an affirmation that he has authority to make the contract, and he may justly be held responsible for the truth of it; and it is no more than reasonable that he should suffer the consequences of his mistake, rather than the party who is misled by it, because, before holding himself out as such agent, it is his duty to ascertain whether his claim so to act is well founded or not; and he surely cannot be heard to complain that others have confided in his assertion of authority, and upon the strength of it have entered into reciprocal engagements with him. Even if wholly innocent of any wrongful purpose, his case falls within the familiar principle, that when one of two innocent persons must suffer a loss, it ought to be borne by him who has been the means of causing it, by inducing the other to confide in the truth of his representations."

¹⁷⁴ *Bank of Hamburg v. Wray*, 4 Strob. (S. C.) 87, 51 Am. Dec. 659; *Edings v. Brown*, 1 Rich. Law (S. C.) 255; *Bartlett v. Tucker*, 104 Mass. 336, 6 Am. Rep. 240.

¹⁷⁵ *Mendenhall v. Stewart*, 18 Ind. App. 262.

This rule applies, however, only where the third party has also acted in good faith, for if he knew, or by using reasonable care could have known, that the agent was unauthorized, the agent would not be liable.¹⁷⁶

All these rules are based upon plain principles of justice, for every person assuming to act as the agent of another, by a natural if not by a necessary implication, holds himself out as having competent authority to make the contract or do the act.

§ 580. Where agent bona fide acts in excess of authority.

So the same rules apply where an agent has some authority from his principal, but in making the contract in question exceeds that authority, and the principal refuses to ratify or be bound by the contract. In such a case, the agent will be personally liable for damages to the person with whom he contracted, although he may have been innocent of an intention to deceive, and in fact bona fide believed that he possessed the authority which he assumed to exercise,¹⁷⁷ unless the other contracting party knew of the agent's lack of authority.¹⁷⁸ Thus, where an agent exceeded his authority, in sending, in his principal's name, for a physician to attend

¹⁷⁶ *Newman v. Sylvester*, 42 Ind. 112; *Newport v. Smith*, 61 Minn. 277. See post, § 582.

¹⁷⁷ *Jones v. Downman*, 4 Q. B. 235; *Parrot v. Wells*, 2 Vern. 127; *Crawford v. Barkley*, 18 Ala. 270; *Lazarus v. Shearer*, 2 Ala. 718; *Dale v. Donaldson Lumber Co.*, 48 Ark. 188, 3 Am. St. Rep. 224; *Charles v. Eshleman*, 5 Colo. 107; *Walker v. Haughey*, 25 Ill. App. 135; *Clay v. Clay*, 23 Ill. App. 109; *Pitman v. Kintner*, 5 Blackf. (Ind.) 250, 33 Am. Dec. 469; *Lewis v. Reed*, 11 Ind. 239; *Sandford v. McArthur*, 18 B. Mon. (Ky.) 411; *Richie v. Bass*, 15 La. Ann. 668; *Keener v. Harrod*, 2 Md. 63, 56 Am. Dec. 706; *Brown v. Johnson*, 12 Smedes & M. (Miss.) 398, 51 Am. Dec. 118; *Myers Tailoring Co. v. Keeley*, 58 Mo. App. 491; *Taylor v. Nostrand*, 134 N. Y. 108; *Meech v. Smith*, 7 Wend. (N. Y.) 315; *Feeter v. Heath*, 11 Wend. (N. Y.) 478; *Cochran v. Baker*, 34 Or. 555; *Kroeger v. Pitcairn*, 101 Pa. 311, 47 Am. Rep. 718; *Hampton v. Speckenagle*, 9 Serg. & R. (Pa.) 212, 11 Am. Dec. 704; *Hopkins v. Everly*, 150 Pa. 117; *Roberts v. Button*, 14 Vt. 195; *McCurdy v. Rogers*, 21 Wis. 197, 91 Am. Dec. 468.

¹⁷⁸ *Jones v. Downman*, 4 Q. B. 235; and see post, § 582.

an employe of such principal, wounded in a private brawl, the agent was held personally responsible for the services of such physician.¹⁷⁹ So an agent renders himself personally responsible where he makes a contract upon terms which he knows he has no authority to agree to, although the contract be made in the line of his business as agent.¹⁸⁰

§ 581. Exception to this rule—Death of principal.

An exception to this rule, however, exists where an agent has been authorized, but the principal dies before the contract is made, and the agent and other party are ignorant of this fact. In such case, the death of the principal revokes the agent's authority, and the contract thereafter entered into by the agent on his behalf is made without authority, and hence there is no contract binding on the principal or his representatives, but as there is no fault on the part of the agent by reason of which the third party is injured, there would be no personal liability on the agent.¹⁸¹ In all of the above cases, in which the agent has been held personally responsible, he has either been guilty of some fraud, has made some statement which he knew to be false, or has stated to be true what he did not know to be true, omitting, at the same time, to give such information to the other contracting party as would enable him, equally with himself, to judge as to the authority under which he proposed to act. But the continuance of the life of the principal must be deemed a fact equally within the knowledge of both contracting parties, and consequently neither is deceived or misled by the other. If, then, there must be some wrong or omission on the part of the agent, in order to make him personally liable, it will follow that he is not responsible where the principal dies

¹⁷⁹ *Dale v. Donaldson Lumber Co.*, 48 Ark. 188, 3 Am. St. Rep. 224; and see *Bay v. Cook*, 22 N. J. Law, 343.

¹⁸⁰ *Meech v. Smith*, 7 Wend. (N. Y.) 315.

¹⁸¹ *Smout v. Ilbery*, 10 Mees. & W. 1; *Carriger v. Whittington*, 26 Mo. 311, 72 Am. Dec. 212; *Ginochio v. Porcella*, 3 Bradf. Sur. (N. Y.) 277; *Jenkins v. Atkins*, 1 Humph. (Tenn.) 294, 34 Am. Dec. 648.

See comment on *Smout v. Ilbery*, *supra*, in Keener's *Quasi-Contracts*, 334.

without his knowledge before the contract is made, and of which he is ignorant at the time of the contract.¹⁸² In other words, there is an implied understanding between the parties that the contract proceeds upon the presumption that the principal is still living, and capable of being bound by the contract, and that the agent only stipulates for good faith and the existence of an original authority to make the contract. "If, at the time, the agent should bona fide say to the other party, 'I know not whether my principal is dead or living; but, if living, I warrant him bound by the contract;' no doubt could be entertained that, if the principal were dead at the time, and his death were unknown to both parties, the agent would be absolved from all responsibility;" and "in legal contemplation, there is no distinction between such an express undertaking and an implied engagement to the same effect, virtually understood at the time by both parties, from the very circumstances of the case."¹⁸³ Thus, where the wife of an intestate, after his decease, but before the news of his death had reached her, received debts due to him, acting as his agent to make collections during his absence for her support, and having appropriated the money to the purpose authorized, in good faith, she was not liable to the creditors of the deceased.¹⁸⁴

§ 582. Qualification of this rule—Where third party has knowledge of agent's want of authority.

(a) **In general.**—The above rules in respect to an agent's liability for entering into a contract on behalf of an assumed principal apply, however, only where the third party has acted in good faith and has been induced or misled into entering into the contract by the agent's express or implied representations as to authority. In order that such party may hold the agent liable for damages, it is necessary that he should have been bona fide ignorant of the extent of the agent's authority. If he knows, or has knowledge sufficient to put him on inquiry, of the facts and circumstances surrounding

¹⁸² *Smout v. Ilbery*, 10 Mees. & W. 1.

¹⁸³ *Story*, Ag. § 265a; and see cases cited in preceding notes.

¹⁸⁴ *Ginocchio v. Porcella*, 3 Bradf. Sur. (N. Y.) 277.

the agency, and he fails to make use of such knowledge or to make such inquiry, it cannot be said that he has been induced or misled into the contract by the agent's express or implied representations, and he cannot hold the agent responsible for any injury he may have suffered thereby,¹⁸⁵ unless the agent has concealed or misrepresented material facts to his injury.¹⁸⁶ Hence, where an agent, at the time he enters into the contract, bona fide discloses to the other party all the facts and circumstances in the case, in reference to the authority which he claims to have, such party cannot say that he has been misled, so as to hold the agent liable for any damage he may have incurred.¹⁸⁷

¹⁸⁵ *Halbot v. Lens* [1901] 1 Ch. 344; *Jones v. Downman*, 4 Q. B. 235; *Ware v. Morgan*, 67 Ala. 461; *Ogden v. Raymond*, 22 Conn. 379, 58 Am. Dec. 429; *Newman v. Sylvester*, 42 Ind. 106; *Thilmany v. Iowa Paper Bag Co.*, 108 Iowa, 357, 75 Am. St. Rep. 259; *Abeles v. Cochran*, 22 Kan. 405, 31 Am. Rep. 194; *Murray v. Carothers*, 1 Metc. (Ky.) 71; *Sandford v. McArthur*, 18 B. Mon. (Ky.) 411; *Barry v. Pike*, 21 La. Ann. 221; *Newport v. Smith*, 61 Minn. 277; *Michael v. Jones*, 84 Mo. 578; *Humphrey v. Jones*, 71 Mo. 62; *Western Cement Co. v. Jones*, 8 Mo. App. 373; *Hall v. Lauderdale*, 46 N. Y. 70; *Snow v. Hix*, 54 Vt. 478; *McCurdy v. Rogers*, 21 Wis. 197, 91 Am. Dec. 468.

¹⁸⁶ *Ogden v. Raymond*, 22 Conn. 379, 58 Am. Dec. 429; *Newman v. Sylvester*, 42 Ind. 106; *Barry v. Pike*, 21 La. Ann. 221. As was said by Ellsworth, J., in *Ogden v. Raymond*, 22 Conn. 379, 58 Am. Dec. 429: "It does not follow that an agent, acting either in a public or private capacity, is of necessity made personally liable, although he does not give a cause of action against some one else. We believe the law to be, that if a person assumes to act and enter into contracts in the name of another as his principal, and does this with an honest intent, openly and fully disclosing all the facts touching his supposed authority, or which may be fairly implied from his situation, and especially if he provides against his personal liability, in any event he cannot be held liable unless he be guilty of fraud or false representation."

¹⁸⁷ *Smout v. Ilbery*, 10 Mees. & W. 1; *Halbot v. Lens* [1901] 1 Ch. 344; *Ware v. Morgan*, 67 Ala. 461; *Ogden v. Raymond*, 22 Conn. 379, 58 Am. Dec. 429; *Newman v. Sylvester*, 42 Ind. 106; *Barry v. Pike*, 21 La. Ann. 221; *Newport v. Smith*, 61 Minn. 277; *Humphrey v. Jones*, 71 Mo. 62; *Michael v. Jones*, 84 Mo. 578; *Hall v. Lauderdale*, 46 N. Y. 70.

In Louisiana this is provided for by statute: "The mandatory,

(b) **Mutual mistake of law.**—So where all the facts and circumstances surrounding the case are known to both the agent and third party, but there is a mutual mistake as to a matter of law—as the principal's liability or the legal effect of the agent's written authority—the agent cannot be held personally responsible by reason of the mere fact that the principal cannot be held,¹⁸⁸ unless the agent by some apt expression guarantees the contract or assumes it himself.¹⁸⁹ Thus, where the agent's want of authority grows out of the law, it is a matter of law as open to the knowledge of the person contracting with him as to the agent himself, and the agent cannot be held personally liable for making a contract in excess of such authority, unless he has made false representations or concealed material facts.¹⁹⁰ If there is no misrepresentation in point of fact, but merely a mistake or misrepresen-

who has communicated his authority to a person with whom he contracts in that capacity, is not censurable to the latter for anything done beyond it, unless he has entered into a personal guarantee." Art. 3012 of the Civil Code; *Levy v. Lane*, 38 La. Ann. 252.

¹⁸⁸ *Beattie v. Ebury*, 7 Ch. App. 777; *Seeberger v. McCormick*, 178 Ill. 404, 416; *Abeles v. Cochran*, 22 Kan. 406, 31 Am. Rep. 194; *Jefts v. York*, 10 Cush. (Mass.) 392; *Michael v. Jones*, 84 Mo. 578; *Humphrey v. Jones*, 71 Mo. 62; *Western Cement Co. v. Jones*, 8 Mo. App. 373; *McReavy v. Eshelman*, 4 Wash. 760. And see *Oliver v. Bank of England* [1902] 1 Ch. 610.

As was said in *McReavy v. Eshelman*, 4 Wash. 760: "If the agent represents that he has a certain authority, and the representation be false, the third person cannot charge the agent where the authority claimed, if it had existed, would not have warranted the contract based upon it, or bound the principal to its performance, unless the agent by some apt expression guarantees the contract or assumes it himself. Such cases often arise where the legal effect of an agent's written authority is challenged after the agent and the third person have construed it in a manner different from its true effect. In such cases the principal is not bound and neither is the agent, because the intention was not to bind the agent. There is a mutual mistake of the law which one is bound to know as well as the other."

¹⁸⁹ *McReavy v. Eshelman*, 4 Wash. 760.

¹⁹⁰ *Abeles v. Cochran*, 22 Kan. 405, 31 Am. Rep. 194. The power of bank directors is a matter of law. *Sandford v. McCarter*, 18 B. Mon. (Ky.) 411.

tation in point of law, that is to say if the person who deals with the agent is fully aware in point of fact what the extent of the agent's authority to bind his principal is, but makes a mistake as to whether that authority is sufficient in point of law or not, under those circumstances the agent could not be liable.¹⁹¹ "For instance," says Mellish, L. J.,¹⁹² "supposing when an agent comes and proposes to make a contract on behalf of his principal, instead of trusting his representation that he has power to bind his principal, the person dealing with the agent were to ask to see his authority, and a power of attorney executed by the principal was shown to him, and he took the opinion of his lawyer as to whether the power of attorney was sufficient to bind the principal, and was advised that it was sufficient to bind the principal, and then after that, a contract was made, and it turned out when the point was raised in a court of law that the power of attorney was insufficient,—under such circumstances I am clearly of opinion that there would be no warranty on the part of the agent that the power of attorney was good in point of law."

§ 583. Agent not liable unless contract would have been enforceable against principal if authorized.

An agent will not be liable, however, where he makes an unauthorized contract for an assumed principal, unless the contract is one that could have been enforced against the principal if authorized. Or in other words: In order to make the agent liable in such a case, the unauthorized contract must be one which the law would enforce against the principal if it had been authorized by him. "Otherwise the anomaly would exist of giving a right of action against the assumed agent for an unauthorized representation of his power to make a contract, when the breach of the contract itself, if he had been authorized to make it, would have furnished no ground of action."¹⁹³ For example, a contract

¹⁹¹ *Beattie v. Ebury*, 7 Ch. App. 777.

¹⁹² *Beattie v. Ebury*, 7 Ch. App. 777.

¹⁹³ *Baltzen v. Nicolay*, 53 N. Y. 467; *Dung v. Parker*, 52 N. Y. 494; *Thilmany v. Iowa Paper Bag Co.*, 108 Iowa, 357, 75 Am. St. Rep. 259; *Snow v. Hix*, 54 Vt. 478. But see *Knickerbocker v. Wilcox*, 83 Mich. 200, 21 Am. St. Rep. 595.

invalid by the statute of frauds confers no rights, and creates no obligation, as between the parties to it, and no claim can be founded upon it as against third persons. Thus, where defendant falsely represented that he had authority to act as agent for another, and in his assumed capacity made a parol contract for the leasing of certain property to the plaintiff for the term of two years, in consequence of which the plaintiff incurred expense in procuring fixtures to fix up the property, inasmuch as the contract would have conferred no right upon the plaintiff had defendant possessed the authority claimed, plaintiff was not injured by the representation, and could not maintain an action either upon the contract or in tort.¹⁹⁴ So, as a national bank has no authority to enter into a contract of guaranty, an officer or agent of such a bank, entering into such a contract on behalf of the bank, cannot be held personally liable.¹⁹⁵

§ 584. Effect of ratification.

If the principal ratifies the contract thus made by the agent without or in excess of his authority, it is the same as if originally authorized and relieves the agent from any personal liability, unless the contract was made to charge him personally.¹⁹⁶ But this would not hold good in cases in which suit for damages had been brought against the agent before ratification, nor in cases in which injury had resulted to plaintiffs from the agent's acts before ratification, or in which the effect of making the ratification thus relate back would be to put the plaintiffs in a worse position than they would have otherwise been in, in consequence of such unauthorized contract.¹⁹⁷ Nor would this rule hold good in those cases which hold an agent personally liable on a con-

¹⁹⁴ *Dung v. Parker*, 52 N. Y. 494.

¹⁹⁵ *Thilmany v. Iowa Paper Bag Co.*, 108 Iowa, 357, 75 Am. St. Rep. 259. But see *Knickerbocker v. Wilcox*, 83 Mich. 200, 21 Am. St. Rep. 595.

¹⁹⁶ *Hopkins v. Everly*, 150 Pa. 117; *Sheffield v. Ladue*, 16 Minn. 388, 10 Am. Rep. 145. See ante, § 150.

¹⁹⁷ *Sheffield v. Ladue*, 16 Minn. 388, 10 Am. Rep. 145.

tract which he has entered into on behalf of an assumed principal, but without his authority.¹⁹⁸

§ 585. Nature of agent's liability in respect to unauthorized contracts.

(a) **On contract in agent's name.**—Of course, if an agent enters into an unauthorized contract on behalf of an assumed principal in his own name or uses apt words to bind himself, the words descriptive of his agency may be rejected as surplusage, and he may be held personally liable directly on the contract.¹⁹⁹ And this will also be true where he expressly pledges his own credit, or where exclusive credit is given to him upon the contract.²⁰⁰ And in some cases the rule has been stated that if a person having no authority to act as agent undertakes so to act in making a contract, if the contract which he makes, rejecting that part of it which he was not authorized to put into it, contains apt words to charge himself, he is personally liable.²⁰¹ Where an assumed agent receives the consideration on a contract, there is an implied promise to pay, on which an action may be maintained against him.²⁰²

¹⁹⁸ *Palmer v. Stephens*, 1 Denio (N. Y.) 471; *Rossiter v. Rossiter*, 8 Wend. (N. Y.) 494, 24 Am. Dec. 62.

¹⁹⁹ *Hall v. Crandall*, 29 Cal. 567, 89 Am. Dec. 64; *Wallace v. Bentley*, 77 Cal. 19, 11 Am. St. Rep. 231; *Ogden v. Raymond*, 22 Conn. 379, 58 Am. Dec. 429; *Taylor v. Shelton*, 30 Conn. 122; *Duncan v. Niles*, 32 Ill. 532, 83 Am. Dec. 293; *Hancock v. Yunker*, 83 Ill. 208; *Rice v. Western Fuse & Explosives Co.*, 64 Ill. App. 603; *Stetson v. Patten*, 2 Me. 358, 11 Am. Dec. 111; *Cole v. O'Brien*, 34 Neb. 68, 33 Am. St. Rep. 616; *Farmers' Co-operative Trust Co. v. Floyd*, 47 Ohio St. 525, 21 Am. St. Rep. 846; *McCurdy v. Rogers*, 21 Wis. 197, 91 Am. Dec. 468.

²⁰⁰ *McCurdy v. Rogers*, 21 Wis. 197, 91 Am. Dec. 468. See ante. § 565.

²⁰¹ *Woodes v. Dennett*, 9 N. H. 55; *Weare v. Gove*, 44 N. H. 196; *Byars v. Doores' Adm'r*, 20 Mo. 284; *Moor v. Wilson*, 26 N. H. 332; *Savage v. Rix*, 9 N. H. 263.

²⁰² *Russell v. Koonce*, 104 N. C. 237, holding that an agent does not become individually liable upon a contract because his authority to bind his principal is disowned by the latter, unless the consideration is received by the agent, out of which arises an implied promise to pay. In such case the agent may become personally

(b) **On contract in principal's name.**—But where an agent assumes to make a contract in the name of, or on behalf of, an alleged principal, when he has in fact no authority to do so, as to whether or not the agent is personally liable directly on the contract, the authorities do not agree. In some cases it has been held that where an agent makes a written contract, except a sealed instrument, in the name of or on behalf of an assumed principal, when he in fact has no authority to do so, all matters which the contract contains in relation to the principal will be treated as surplusage, and the agent will be personally liable on the contract on the ground that it must have been his intention to bind some one by the contract, and since it does not bind the assumed principal because it was unauthorized, it must have been intended to bind the agent himself, for otherwise no one would be bound by the contract.²⁰³ But in order to fix and

answerable upon the contract, but otherwise the action must be for damages for his false assumption of authority.

²⁰³ *Gillaspie v. Wesson*, 7 Port. (Ala.) 454, 31 Am. Dec. 715; *Mitchell v. Hazen*, 4 Conn. 495, 10 Am. Dec. 169; *Terwilliger v. Murphy*, 104 Ind. 32; *Pitman v. Kintner*, 5 Blackf. (Ind.) 251, 33 Am. Dec. 469; *Andrews v. Tedford*, 37 Iowa, 314; *Levy v. Lane*, 38 La. Ann. 252; *Richie v. Bass*, 15 La. Ann. 668; *Keener v. Harrod*, 2 Md. 63, 56 Am. Dec. 706; *Hatch v. Smith*, 5 Mass. 42, 52; *Coffman v. Harrison*, 24 Mo. 524; *Byars v. Doores' Adm'r*, 20 Mo. 284; *Myers Tailoring Co. v. Keeley*, 58 Mo. App. 491; *Woodes v. Dennett*, 9 N. H. 55; *Dusenbury v. Ellis*, 3 Johns. Cas. (N. Y.) 70, 2 Am. Dec. 144; *White v. Skinner*, 13 Johns. (N. Y.) 307, 7 Am. Dec. 381; *Collins v. Allen*, 12 Wend. (N. Y.) 356, 27 Am. Dec. 130; *Rossiter v. Rossiter*, 8 Wend. (N. Y.) 494, 24 Am. Dec. 62; *Meech v. Smith*, 7 Wend. (N. Y.) 315 (and see *Walker v. Bank of New York State*, 9 N. Y. 582, explaining the rule in these cases; but see later New York cases in note 209 post); *Hampton v. Speckenagle*, 9 Serg. & R. (Pa.) 212, 11 Am. Dec. 704; *Roberts v. Button*, 14 Vt. 195; *Clark v. Foster*, 8 Vt. 98.

In *Knickerbocker v. Wilcox*, 83 Mich. 200, 21 Am. St. Rep. 595, it was held that a letter written by the cashier of a national bank on the letter-head of his bank, to a bank in another state, to the effect that if the latter bank will sign a replevin bond for customers of the writer's bank, "we will stand between you and all harm," and signed by the writer as "cashier," constituted an agreement, when acted upon, into which a national bank cannot legally enter.

enforce this personal liability, it must appear that the party sought to be charged signed as agent—that is, professed to act for another—and that such act was without authority.²⁰⁴ Under such rule a subsequent ratification by the principal would not relieve the agent from his liability on the contract.²⁰⁵ Thus, where an agent, under pretense of authority from another, executed a note in his name, it has been held that the name of the person for whom he assumed to act should be rejected as surplusage, and the agent held personally bound thereby.²⁰⁶ So, it has been held that where a person executes a bond as agent for another, without authority, such person so assuming to act is personally bound, as though he had covenanted in his own name simply.²⁰⁷ So, it has been held that where an agent employed to bid for the vendor at a public sale, at a limited price, exceeds his authority, he will be considered as making the purchase on his own account, and be liable as purchaser.²⁰⁸

(c) **Same—Better rule.**—By the weight of authority, however, the principle upon which the above cases rest, if they are supposed to present the only ground of liability of the agent, has been substantially repudiated, and it is now gen-

and binds the writer personally, in the absence of clear and unequivocal proof that he was claiming to act for his bank, and did not intend to bind himself.

In *Bay v. Cook*, 22 N. J. Law, 343, it was held that where an overseer of the poor, or any other agent, makes contracts without sufficient authority legally to bind the township or his principal, he is personally responsible, although the contract may be in the name of the principal, and credit given to the principal.

²⁰⁴ *Episcopal Church of St. Peter v. Varian*, 28 Barb. (N. Y.) 644.

²⁰⁵ *Palmer v. Stephens*, 1 Denio (N. Y.) 471; *Rossiter v. Rossiter*, 8 Wend. (N. Y.) 494, 24 Am. Dec. 62.

²⁰⁶ *Dusenbury v. Ellis*, 3 Johns. Cas. (N. Y.) 70, 2 Am. Dec. 144. It was said in this case: "The party who accepts a note under such mistake or imposition, ought to have the same remedy against the attorney (agent), who imposes on him, as he would have had against the pretended principal if he had been really bound." And see *Rossiter v. Rossiter*, 8 Wend. (N. Y.) 494, 24 Am. Dec. 62.

²⁰⁷ *White v. Skinner*, 13 Johns. (N. Y.) 307, 7 Am. Dec. 381.

²⁰⁸ *Hampton v. Speckenagle*, 9 Serg. & R. (Pa.) 212, 11 Am. Dec. 704.

erally agreed that the agent does not become personally liable on the contract, in such cases, unless it contains apt words to charge him, as such a course would be making a new contract between the parties instead of construing the old one; but his only liability in such cases is in an action for deceit or in an action for the breach of his warranty of authority.²⁰⁹ By the

²⁰⁹ *Jenkins v. Hutchinson*, 13 Q. B. 744; *Lewis v. Nicholson*, 18 Q. B. 503; *Collen v. Wright*, 8 El. & Bl. 647; *Dale v. Donaldson Lumber Co.*, 48 Ark. 188, 3 Am. St. Rep. 224; *Hall v. Crandall*, 29 Cal. 567, 89 Am. Dec. 64; *Senter v. Monroe*, 77 Cal. 347; *Wallace v. Bentley*, 77 Cal. 19, 11 Am. St. Rep. 231; *Taylor v. Shelton*, 30 Conn. 122; *Ogden v. Raymond*, 22 Conn. 379, 58 Am. Dec. 429; *Johnson v. Smith*, 21 Conn. 627; *Duncan v. Niles*, 32 Ill. 532, 83 Am. Dec. 293; *Hancock v. Yunker*, 83 Ill. 208; *McHenry v. Duffield*, 7 Blackf. (Ind.) 41; *Thilmany v. Iowa Paper Bag Co.*, 108 Iowa, 357, 75 Am. St. Rep. 259; *Harper v. Little*, 2 Me. 14, 11 Am. Dec. 25; *Noyes v. Loring*, 55 Me. 408; *Stetson v. Patten*, 2 Me. 358, 11 Am. Dec. 111; *Bartlett v. Tucker*, 104 Mass. 341, 6 Am. Rep. 240; *Abbey v. Chase*, 6 Cush. (Mass.) 54; *Ballou v. Talbot*, 16 Mass. 461, 8 Am. Dec. 146; *Sheffield v. Ladue*, 16 Minn. 388, 10 Am. Rep. 145; *Cole v. O'Brien*, 34 Neb. 68, 33 Am. St. Rep. 616; *Brong v. Spence*, 56 Neb. 638; *Patterson v. Lippincott*, 47 N. J. Law, 457, 54 Am. Rep. 178; *Baltzen v. Nicolay*, 53 N. Y. 467; *Simmons v. More*, 100 N. Y. 140; *White v. Madison*, 26 N. Y. 117; *Noe v. Gregory*, 7 Daly (N. Y.) 283; *Taylor v. Nostrand*, 134 N. Y. 108; *Hegeman v. Johnson*, 35 Barb. (N. Y.) 200; *Dellius v. Cawthorn*, 13 N. C. (2 Dev.) 90; *Farmers' Co-operative Trust Co. v. Floyd*, 47 Ohio St. 525, 21 Am. St. Rep. 846; *Cochran v. Baker*, 34 Or. 555; *Hopkins v. Mehaffy*, 11 Serg. & R. (Pa.) 126; *McReavy v. Eshelman*, 4 Wash. 760; *McCurdy v. Rogers*, 21 Wis. 197, 91 Am. Dec. 468.

"It is not unfrequently laid down as a rule of law," says Ellsworth, J., in *Ogden v. Raymond*, 22 Conn. 379, 58 Am. Dec. 429. "that if an agent does not bind his principal he binds himself; but this rule needs qualification, and cannot be said to be universally true or correct. * * * If the form of the contract is such that the agent personally covenants, and then adds his representative character, which he does not in truth sustain, his covenant remains personal and in force, and binds him as an individual; but if the form of the contract is otherwise, and the language, when fairly interpreted, does not contain a personal undertaking or promise, he is not personally liable; for it is not his contract, and the law will not force it upon him. He may be liable, it is true, for tortious conduct if he has knowingly or carelessly assumed to bind another without authority; or, when making the contract, has concealed the true state of his authority, and falsely led others to

former rule, courts would often make contracts for parties which they neither intended, nor would have consented, to make. The contract, if binding upon one party, must be binding upon both; and where burdensome conditions precedent were to be performed by the party contracting with the assumed agent, before performance could be demanded of the other party; or where the agent should undertake to sell, lease, or mortgage the property of the assumed principal, or where credit should be given, which the responsibility of the agent would not justify, great injustice might result from such a rule. In such cases, the party contracted with, on learning the facts, must have the right to repudiate the contract, and to hold the assumed agent immediately responsible for damages, without waiting for the time when an action might be maintained on the contract itself.²¹⁰

(d) **Same—Implied warranty of authority.**—Where an agent makes a contract on behalf of his principal, he impliedly warrants that he has authority to bind that principal, and if it turns out that he has no authority to bind his principal and the principal does not ratify the contract, and loss is thereby occasioned, then an action on that warranty can be main-

repose in his authority; but, as we have said, he is not of course liable on the contract itself, nor in any form of action whatever. The question in these cases will be found to be one of construction of the language and meaning of the person who attempts to act for another, and is a question often attended with very great difficulty and doubt; but when the intention is ascertained, that intention should ever be the rule for deciding whose contract it is."

And as was said by Sanderson, J., in *Hall v. Crandall*, 29 Cal. 567, 89 Am. Dec. 64: "If an agent in executing a contract employ terms which in legal effect charge himself, he may be sued upon the instrument itself as a contracting party. This is so because by the use of such terms he has made the contract his own. But if the instrument does not contain such terms, or in other words, contains language which in legal effect bind the principal only, the agent cannot be sued on the instrument itself, for the obvious reason that the contract is not his. If, then, the contract is not binding upon the principal because the agent had no authority to make it, and is not binding on the agent because it does not contain apt words to charge him personally, it is wholly void."

²¹⁰ *White v. Madison*, 26 N. Y. 117, 123.

tained.²¹¹ And as this will give the injured party full redress, there seems to be no reason for stretching the rule so as to render the agent liable directly on the contract. An action upon such warranty must always be appropriate where personal liability attaches to an agent, in consequence of his contracting without authority. In such action the plaintiff would be relieved from the necessity of showing performance of conditions precedent, and from the delay which the terms of the contract might require, if the remedy were limited to an action on the contract.²¹² Thus, if a person signs the name of another as maker of a promissory note, who has not authorized him to do so, and who therefore is not bound by the signature, the signer is not personally liable in an action on the note itself, even if he signs his own name also as that of the agent affixing the other signature; but his liability extends only to the wrong done in falsely representing himself to be authorized to sign the name of the other person.²¹³ So, where a person, acting as agent, borrows money for his principal, and gives the latter's obligation for it, and it turns out that the principal was not of legal capacity to make such contract, and of course could confer no power on another, the agent is not personally liable on the contract, as his contract; and if in fact he was not authorized he would be liable, in an action on the case.²¹⁴ So one who assumes, without authority, to act as the agent of another and to sign his name to a due-bill as maker, is not himself personally liable thereon, when there is nothing on the face of the instrument to show that he personally promises to pay the amount named therein.²¹⁵

²¹¹ *Beattie v. Ebury*, 7 Ch. App. 777; *Noe v. Gregory*, 7 Daly (N. Y.) 283; *White v. Madison*, 26 N. Y. 117; *Simmons v. More*, 100 N. Y. 140.

²¹² *White v. Madison*, 26 N. Y. 117, 124.

²¹³ *Bartlett v. Tucker*, 104 Mass. 336, 6 Am. Rep. 240; *Long v. Colburn*, 11 Mass. 97, 6 Am. Dec. 160; *Ballou v. Talbot*, 16 Mass. 461, 8 Am. Dec. 146; *Jefts v. York*, 4 Cush. (Mass.) 371, 50 Am. Dec. 791; *Hall v. Crandall*, 29 Cal. 567, 89 Am. Dec. 64; *Sheffield v. Ladue*, 16 Minn. 388, 10 Am. Rep. 145.

²¹⁴ *Jefts v. York*, 10 Cush. (Mass.) 392.

²¹⁵ *Cole v. O'Brien*, 34 Neb. 68, 33 Am. St. Rep. 616.

§ 586. Form of action against agent.

The form of action or remedy that may be maintained against an agent for entering into a contract on behalf of another, without the latter's authority, depends upon the facts and circumstances of the particular case. In those cases in which the agent has made an express or implied representation of his authority, knowing that he does not possess such, whether he is acting without any authority, or in excess thereof, that is, where he is guilty of some fraud, the most usual remedy of the third party against the agent is in an action on the case for deceit, to recover for the injury caused by his falsely assuming to have authority;²¹⁶ and some of the cases hold that this is the only action that may be maintained against him in such cases,²¹⁷ though in some jurisdictions, in such cases, an action on the case for the tort is concurrent with an action of assumpsit for the breach of an express or implied warranty of authority, and the injured party may bring either one or the other.²¹⁸

²¹⁶ *Jenkins v. Hutchinson*, 13 Q. B. 744; *Polhill v. Walter*, 3 Barn. & Adol. 114; *Ogden v. Raymond*, 22 Conn. 379, 58 Am. Dec. 429; *Taylor v. Shelton*, 30 Conn. 122; *Duncan v. Niles*, 32 Ill. 532, 83 Am. Dec. 293; *Hancock v. Yunker*, 83 Ill. 208; *Thilmany v. Iowa Paper Bag Co.*, 108 Iowa, 357, 75 Am. St. Rep. 259; *Noyes v. Loring*, 55 Me. 408; *Harper v. Little*, 2 Me. 14, 11 Am. Dec. 25; *Jefts v. York*, 4 Cush. (Mass.) 371, 50 Am. Dec. 791; *Jefts v. York*, 10 Cush. (Mass.) 392; *Long v. Colburn*, 11 Mass. 97, 6 Am. Dec. 160; *Bartlett v. Tucker*, 104 Mass. 336, 6 Am. Rep. 240; *Ballou v. Talbot*, 16 Mass. 461, 8 Am. Dec. 146; *Sheffield v. Ladue*, 16 Minn. 388, 10 Am. Rep. 145; *Skaaraas v. Finnegan*, 32 Minn. 107; *Cole v. O'Brien*, 34 Neb. 68, 33 Am. St. Rep. 616; *Parker v. Knox*, 60 Hun (N. Y.) 550; *Noe v. Gregory*, 7 Daly (N. Y.) 283; *Clark v. Foster*, 8 Vt. 98.

²¹⁷ *Noyes v. Loring*, 55 Me. 408; *Bartlett v. Tucker*, 104 Mass. 336, 6 Am. Rep. 240; *Jefts v. York*, 10 Cush. (Mass.) 392; *Abbey v. Chase*, 6 Cush. (Mass.) 54; *Dellus v. Cawthorn*, 13 N. C. (2 Dev.) 90.

²¹⁸ *Lewis v. Nicholson*, 18 Q. B. 503; *Jenkins v. Hutchinson*, 13 Q. B. 744; *Randell v. Trimen*, 18 C. B. 786; *Seeberger v. McCormick*, 178 Ill. 404; *Dung v. Parker*, 52 N. Y. 494; *White v. Madison*, 26 N. Y. 117; *Parker v. Knox*, 60 Hun (N. Y.) 550. In *White v. Madison*, 26 N. Y. 124, *Selden, J.*, says: "If the act of the agent were fraudulent, an action for deceit would lie, but it would be a concurrent remedy with an action on the warranty, and so I appre-

But if the agent has acted in good faith, fully disclosing to the other party all the facts relating to his authority, and he has innocently acted without or in excess of his authority, there being no fraud on his part, the proper action maintainable against him, except in those cases allowing an action directly on the contract, is an action of assumpsit upon the breach of an express or implied warranty of authority.²¹⁹ In such cases there can be no action for deceit against the agent because there has been no deceit on his part, but the law implies that he has warranted the authority which he assumes, and in order to give the injured party a remedy will hold him liable in an action for damages for breach of his warranty of authority.²²⁰ But an agent could not be held liable even in an action for breach of warranty of authority, where in making the unauthorized contract he has expressly agreed with the other party that he will not be personally responsible for any want of authority.²²¹

Whether or not the bringing of one form of action in cases where the agent's acts are fraudulent prevents the maintaining of the other, depends upon the view taken of these remedies in the particular jurisdiction, whether they are held to be independent and inconsistent, or whether they are held to be concurrent and consistent. If they were inconsistent, the plaintiff by bringing an action for deceit with the knowledge of all the facts must be deemed to have made his election of remedies; he could not thereafter maintain an action for a breach of the express or implied warranty. But if they

hend must be the action on the contract itself, if the cases which sustain such action are to be regarded as correctly decided." And in *Dung v. Parker*, 52 N. Y. 500, Andrews, J., says: "If the act of the agent was fraudulent, an action for the deceit is a concurrent remedy with assumpsit."

²¹⁹ *Collen v. Wright*, 8 El. & Bl. 647; *Baltzen v. Nicolay*, 53 N. Y. 467; *Dung v. Parker*, 52 N. Y. 494; *White v. Madison*, 26 N. Y. 117; *Noe v. Gregory*, 7 Daly (N. Y.) 283; *Campbell v. Muller*, 19 Misc. (N. Y.) 189; *Cochran v. Baker*, 34 Or. 555. And see *Firbank's Ex'rs v. Humphreys*, 18 Q. B. Div. 54.

²²⁰ *Collen v. Wright*, 8 El. & Bl. 647; and see cases in preceding note.

²²¹ *Lilly v. Smales* [1892] 1 Q. B. 456.

were consistent and concurrent, then an action for deceit without satisfaction would not bar an action upon the agent's warranty, whether express or implied, as a party may prosecute as many remedies as he legally has, provided they are consistent and concurrent.²²²

§ 587. Burden of proof.

In those cases where an action is brought against the agent on an unauthorized contract entered into by the latter, in order to relieve himself from personal liability on the contract, the burden of proof is on the agent to show that he was authorized to make the contract on behalf of the person whom he undertakes to bind. It is not incumbent on the plaintiff to show that the agent had no authority, but it is upon the agent to show that he had.²²³ But in an action for a breach of the implied warranty of authority, after it appears that the defendant assumed to act as agent for third persons, the burden of proof is not thereby cast on the defendant to show that he had actual authority to so act, but it is upon the plaintiff to show that he did not have such authority.²²⁴

§ 588. Measure of damages.

(a) In general.—The measure of damages in an action against an agent for breach of warranty, or for deceit, for entering into an unauthorized contract with the plaintiff on behalf of an assumed principal is in general the actual loss sustained by the plaintiff as the natural and probable consequences of the agent's lack of authority.²²⁵ It is the loss sus-

²²² *Parker v. Knox*, 60 Hun (N. Y.) 550, 555. And see *Bowen v. Mandeville*, 95 N. Y. 240.

²²³ *Gillaspie v. Wesson*, 7 Port. (Ala.) 454, 31 Am. Dec. 715; *Bay v. Cook*, 22 N. J. Law, 352; *Mott v. Hicks*, 1 Cow. (N. Y.) 513, 13 Am. Dec. 550; *Miller v. Stock*, 2 Bailey (S. C.) 163; *Clark v. Foster*, 8 Vt. 98.

²²⁴ *Noe v. Gregory*, 7 Daly (N. Y.) 283.

²²⁵ *Godwin v. Francis*, L. R. 5 C. P. 295; *Spedding v. Nevell*, L. R. 4 C. P. 212; *Firbank's Ex'rs v. Humphreys*, 18 Q. B. Div. 54; *White v. Madison*, 26 N. Y. 117; *Taylor v. Nostrand*, 134 N. Y. 108; *Parker v. Knox*, 60 Hun (N. Y.) 550; *Dung v. Parker*, 52 N. Y. 494.

tained by the other contracting party by reason of his not having the benefit of the valid contract which the agent assumed to make, or in other words it is the loss which could have been recovered from the principal, had the contract been authorized and the principal failed to perform it.²²⁶ Or as has been said, it is the profits which he might have made if the person for whom the agent had assumed to act had performed the agreement which the agent without authority made in his name.²²⁷

And where an agent exceeds his authority in making a contract, the other contracting party is not bound to look to the principal for so much of the contract as the agent was authorized to make, but may hold the agent responsible to the full amount of the contract.²²⁸ Thus, where an action was brought to recover the damages alleged to have resulted to the plaintiff from the defendant's fraudulent act, in falsely representing himself to the plaintiff to be the agent of a third person, and in having thus bought from the plaintiff for future delivery hops which he subsequently refused to take, by reason of which a loss resulted to the plaintiff through their fall in price, the measure of damages was the difference between the contract price and what the hops were worth at the time when they should, by the terms of the contract, have been delivered.²²⁹

(b) **Special damages.**—The damages, however, are not necessarily measured by the contract; but if any special damages, such as the costs of an unsuccessful suit against the alleged principal, have been sustained by reason of the agent's lack of authority, these also may be recovered from him.²³⁰ Thus,

²²⁶ *Simons v. Patchett*, 7 El. & Bl. 568; *In re National Coffee Palace Co.*, 24 Ch. Div. 367; *Meek v. Wendt*, 21 Q. B. Div. 126; *Wallace v. Bentley*, 77 Cal. 19, 11 Am. St. Rep. 231; *Seeberger v. McCormick*, 178 Ill. 404; *Simmons v. More*, 100 N. Y. 140; *Farmers' Co-operative Trust Co. v. Floyd*, 47 Ohio St. 525, 21 Am. St. Rep. 846.

²²⁷ *Wallace v. Bentley*, 77 Cal. 19, 11 Am. St. Rep. 231.

²²⁸ *Feeter v. Heath*, 11 Wend. (N. Y.) 478.

²²⁹ *Parker v. Knox*, 60 Hun (N. Y.) 550.

²³⁰ *Spedding v. Nevell*, L. R. 4 C. P. 212; *Randell v. Trimen*, 18 C. B. 786; *Collen v. Wright*, 8 El. & Bl. 647; *Godwin v. Francis*, L. R. 5 C. P. 295; *Hall v. Crandall*, 29 Cal. 567, 89 Am. Dec. 64; *Wal-*

the injured party may recover, from an agent making a contract with him on behalf of another without authority, for the loss of improvements made in good faith in pursuance of the contract, in addition to his damages for the loss of his bargain.²³¹ So where an agent made an unauthorized sale of real estate to another, by reason of which the latter was nonsuited in an action against the owners of the estate, it was held that the measure of damages for the breach of warranty of authority was (1) the costs of investigating the title; (2) the costs of the action up to the nonsuit; and (3) the difference between the contract and market prices of the estate.²³² And it has been said that even exemplary damages may be recovered from the agent, if a fraudulent intent appears.²³³ But he is not liable for damages which are not the natural and probable consequences of his acts. Thus he is not liable for special damages by reason of false representations of authority to sell property, on account of which the plaintiff failed to negotiate with the owner, or with his authorized agent, and thus failed to obtain the property, as the plaintiff's failure to do so was not a necessary consequence of the agent's representations.²³⁴

§ 589. Application of these rules to public agents.

These rules, however, do not apply with full force to public agents, where the fact that they are public agents is disclosed to the parties with whom they deal as such agents, for the reason that since such an agent's authority is given to him by public laws or statutes, a person dealing with him is bound to take notice thereof, and is presumed to know the extent of the agent's authority. As has been seen, the law raises a very strong presumption against any credit being given to a public agent acting in the scope of his authority,

lace v. Bentley, 77 Cal. 19, 11 Am. St. Rep. 231; *White v. Madison*, 26 N. Y. 117; *Campbell v. Muller*, 19 Misc. (N. Y.) 189; *Taylor v. Nostrand*, 134 N. Y. 108. But see *Pow v. Davis*, 1 Best & S. 220.

²³¹ *Skaaraas v. Finnegan*, 32 Minn. 107.

²³² *Godwin v. Francis*, L. R. 5 C. P. 395.

²³³ *Sheffield v. Ladue*, 16 Minn. 388, 10 Am. Rep. 145.

²³⁴ *Wallace v. Bentley*, 77 Cal. 19, 11 Am. St. Rep. 231.

and requires a clear intention on his part to charge himself in order to make him personally liable. This presumption of the law is equivalent to an implied agreement that he shall not be liable while acting within his authority. If he acts in a case where he has no authority and fully discloses to the party with whom he is dealing his want of authority, or such want of authority is otherwise known to the other party, there seems to be no reason why the same presumption should not then be raised against the liability of the agent as when he was acting within the scope of his authority; and if such an agent has not personally bound himself to the other party by an express agreement or has been guilty of no fraud, he will not be personally liable, either in an action for deceit or in an action for breach of warranty of authority, although through ignorance of the law he may have exceeded his authority.²³⁵ Thus, where an agent acts under a public statute, the person with whom he deals will be held to a knowledge of the powers it confers, and consequently should have known that the agent was exceeding his authority, and the latter cannot be held personally liable.²³⁶ So, an agent of the government, appointed to superintend the execution of a contract with the United States, but not to make a contract with any one, is not personally liable for demanding, through a misconstruction of its terms, more than the contract calls for.²³⁷ So, where commissioners of highways, in a proceeding to lay out a highway, being unable to agree with a landowner as to the damages he would sustain, submitted the matter of damages to arbitration, and executed their bond in their individual names containing an express covenant to abide by and perform the award, they having no power to bind their town in this manner, they were held not individually liable on such bond.²³⁸

²³⁵ *New York & C. S. S. Co. v. Harbison*, 16 Fed. 681, 688; *Curtis v. U. S.*, 2 Ct. Cl. 144; *Perry v. Hyde*, 10 Conn. 329; *Mann v. Richardson*, 66 Ill. 481; *Broadwell v. Chapin*, 2 Ill. App. 511; *Hull v. Marshall County*, 12 Iowa, 142; *Murray v. Carothers*, 1 Metc. (Ky.) 71; *Sanborn v. Neal*, 4 Minn. 126, 77 Am. Dec. 502; *McCurdy v. Rogers*, 21 Wis. 197, 91 Am. Dec. 468.

²³⁶ *McCurdy v. Rogers*, 21 Wis. 197, 91 Am. Dec. 468.

²³⁷ *Webster v. Drinkwater*, 5 Me. 319, 17 Am. Dec. 238.

²³⁸ *Mann v. Richardson*, 66 Ill. 481.

This exception in favor of public agents, however, does not extend to agents of public corporations, such as cities, towns, etc., when not in the exercise of governmental functions, but only to agents of the government as principal, or of such corporations when in the exercise of some governmental duty or function. So if they go beyond their authority as agent of the government, and act in some other capacity than public agent in making contracts, they may be held personally liable.²³⁹ Thus, where the selectmen of one town made a written promise, without authority, to the selectmen of another town to pay for support furnished a certain pauper, and by reason of such promise the selectmen of the latter town forebore to proceed under the statute against the former, and became personally liable to their own town, it was held that an action could be maintained by them on such promise against the selectmen of the former town, though they made the promise as selectmen.²⁴⁰

C. On Quasi Contracts—For Money Had and Received.

§ 590. In general.

As a general rule, in order that a person may be bound by a contract, there must be an agreement or intention on his part to become so bound; but there are many cases in which the law imposes obligations upon a person, without regard to his will, which it permits to be enforced by the remedies applicable to contracts. These obligations are termed quasi contracts.²⁴¹ Thus, it is a well settled principle of the law of contracts that if a man has money or property to which, in equity and good conscience, another is entitled, the law creates a promise on his part to pay it to the latter, and the latter may enforce the obligation either at law or in equity.²⁴² In accordance with this doctrine, it may be stated generally that where an agent has, in his possession, money

²³⁹ *McClenticks v. Bryant*, 1 Mo. 598, 14 Am. Dec. 310; *Underhill v. Gibson*, 2 N. H. 352, 9 Am. Dec. 82.

²⁴⁰ *Underhill v. Gibson*, 2 N. H. 352, 9 Am. Dec. 82.

²⁴¹ See *Hammon*, Cont. 23.

²⁴² See *Hammon*, Cont. 721.

or property which in equity and good conscience belongs to another, a third person, there is an implied promise on his part to pay it over to such person, and the latter may maintain an action against the agent to enforce such promise. These quasi contracts of an agent for money received may arise in two ways: (1) Where he has received money from a third person, through mistake or fraud, to be paid over to his principal, and which the third person seeks to recover; and (2) where he has received money from his principal which he undertakes to pay to a third person, but which the agent has misappropriated and failed or refused to pay over.

§ 591. For money received from third person for principal by mistake or fraud.

(a) **In general.**—Where an agent receives money from a third person for his principal, under such circumstances that it could be recovered from the principal, the agent's liability therefor depends upon the facts and circumstances of the particular case; as whether or not he has paid it over before or after notice not to do so; whether he has changed his legal position before notice; whether he has disclosed his agency; whether it has been given to him voluntarily, or by extortion or fraud; or whether the contingencies or conditions upon which it is to be paid over have happened or have been performed. But it may be stated generally that so long as the money remains in the agent's possession without his having done anything to change his original legal position, as by paying it over to his principal, a third person, having the right to recover it from his principal, may recover it from the agent in an action of assumpsit.²⁴³ An action of as-

²⁴³ *Buller v. Harrison*, Cowp. 568; *Cox v. Prentice*, 3 Maule & S. 348; *Elliott v. Swartwout*, 10 Pet. (U. S.) 137, 155; *Wallis v. Shelly*, 30 Fed. 747; *Eufaula Grocery Co. v. Missouri Nat. Bank*, 118 Ala. 408; *Law v. Nunn*, 3 Ga. 90; *McDonald v. Napier*, 14 Ga. 89; *Smith v. Binder*, 75 Ill. 492; *Gray v. Callender*, 181 Ill. 173; *La Farge v. Kneeland*, 7 Cow. (N. Y.) 456; *Herrick v. Gallagher*, 60 Barb. (N. Y.) 566; *Metcalf v. Denson*, 4 Baxt. (Tenn.) 565; and see cases cited in following notes.

In *Kurzawski v. Schneider*, 179 Pa. 500, it is held that an agent is not liable in an action, by a purchaser, for money paid on ac-

sumpsit for money had and received may be brought against an agent who received for his principal, the amount of an execution in the latter's favor, on the judgment being subsequently reversed and restitution ordered; the money not having been actually paid over, or so applied as to exonerate the agent.²⁴⁴ So where a party insuring has paid the premium to the agent of the company, and before the agent has paid over the same, or assumed any liability on account of it, the company becomes insolvent, and such party notifies the agent that he claims the money, and does not rely upon the policy issued to him, which is worthless, he may recover back the premium in a suit against the agent, even though he does not surrender the policy until after suit brought.²⁴⁵ And in an action against an agent by one who has paid money to him on account of his principal, it being shown that the money was paid to the agent, it will not be presumed, in the absence of proof on that subject, that the agent has paid over the money to his principal, for where the existence of a particular subject-matter or relation has once been proved, its continuance is presumed till proof be given to the contrary, or till a different presumption be afforded by the very nature of the subject-matter.²⁴⁶

But where the agent is known as such to the third person, and he receives the money from such person in pursuance of a valid authority, without any fraud, duress, or mistake, he is not liable to such person in an action to recover it back, although he has not paid it over to his principal. In such case an agent is answerable only to his principal, and the third person must sue the principal, to recover back such

count of a contract for the purchase of land from his principal, on the proof of facts which would enable the purchaser to rescind the contract. Where a check for the proceeds of a discounted note is drawn to the order of the indorser on the note, and is indorsed by him, it is not a sufficient affidavit of defense in an action for money had and received on the check, that he did not receive the money personally, and that he was merely an agent for other parties. *Cook v. Forker*, 193 Pa. 461.

²⁴⁴ *Langley v. Warner*, 1 Sandf. (N. Y.) 209.

²⁴⁵ *Smith v. Binder*, 75 Ill. 492.

²⁴⁶ *Shipherd v. Underwood*, 55 Ill. 475.

money.²⁴⁷ Nor is he liable, under such circumstances, to an action on behalf of a third person who is ultimately entitled to the money, for neglecting to pay the same upon request.²⁴⁸

(b) **Where paid over after notice.**—If a third person voluntarily pays money to an agent for the use of his principal, but does so through a mistake of fact, he has a right to recover it back, and if he gives notice to the agent of the mistake and demands him not to pay it over to his principal, but the agent does so after he has received such notice, the latter may be compelled to repay the money in an action of assumpsit for money had and received.²⁴⁹ This rule applies, however, only where the money has been paid to the agent under a mistake of fact; a mistake of law, as to the liability of the principal, or a failure of consideration would not be sufficient.²⁵⁰ An agent who has received usurious interest for his principal, and has been notified that he will be held accountable for it to the party having paid it, cannot escape liability therefor, on the ground that the suit should be against the principal.²⁵¹

(c) **Where paid over before notice.**—But where in such a case the agent does not receive notice of the mistake until after he has in good faith paid the money over to his prin-

²⁴⁷ *Gulf City Const. Co. v. Louisville & N. R. Co.*, 121 Ala. 621; *Huffman v. Newman*, 55 Neb. 713; *Stephens v. Bacon*, 7 N. J. Law, 1.

²⁴⁸ *Colvin v. Holbrook*, 2 N. Y. 126.

²⁴⁹ *Buller v. Harrison*, Cowp. 568; *Edwards v. Hodding*, 5 Taunt. 815; *Penhallow v. Doane*, 3 Dall. (U. S.) 54; *Elliott v. Swartwout*, 10 Pet. (U. S.) 137; *Griffith v. Johnson's Adm'r*, 2 Har. (Del.) 177; *Law v. Nunn*, 3 Ga. 90; *McDonald v. Napier*, 14 Ga. 89; *Shepard v. Sherin*, 43 Minn. 382; *O'Connor v. Clopton*, 60 Miss. 349; *La Farge v. Kneeland*, 7 Cow. (N. Y.) 456; *Herrick v. Gallagher*, 60 Barb. (N. Y.) 566; *Hearsey v. Pruyn*, 7 Johns. (N. Y.) 179. An agent who receives part payment on an option to purchase from his principal, and agrees to return such payment if the purchaser does not buy, cannot relieve himself from liability by paying over such amount to his principal. *White v. Taylor*, 113 Mich. 543.

²⁵⁰ *Ellis v. Goulton* [1893] 1 Q. B. 350; *Engels v. Heatly*, 5 Cal. 135; *Fowler v. Shearer*, 7 Mass. 14; *Bleau v. Wright*, 110 Mich. 183; *Michael v. Jones*, 84 Mo. 579; *Humphrey v. Jones*, 71 Mo. 62; *Mowatt v. Wright*, 1 Wend. (N. Y.) 355.

²⁵¹ *O'Connor v. Clopton*, 60 Miss. 349.

principal, he would not be liable therefor. The third person's remedy would be against the principal alone, and he could not maintain an action, for money had and received, against the agent;²⁵² and the fact that no settlement has been made of an open running account between the principal and the agent is immaterial.²⁵³ If, in such cases, the money has in fact reached the principal's hands, without notice on the part of the agent that he should not pay the same over, then, since the money has reached the very person to whom the plaintiff intended to pay it, in circumstances implying nothing inequitable on the part of the agent in paying it over, the plaintiff should assert his claim against the principal, and not against the agent.²⁵⁴ Thus, an agent who borrows money on the note of his principal, who, however, had no legal capacity to give a note, is liable to the lender, for money had and received, if the same be demanded before he has paid it over to his principal, or has otherwise accounted to him for it.²⁵⁵

— **What sufficient notice.** The notice of the mistake, and requirement not to pay it over to the principal, need not be formal. The rule that if he pays over without notice, he is not liable, is for the agent's protection, and, to deprive

²⁵² *Buller v. Harrison*, Cowp. 568; *Wallis v. Shelly*, 30 Fed. 747; *Elliott v. Swartwout*, 10 Pet. (U. S.) 137; *United States v. Pinover*, 3 Fed. 305; *Upchurch v. Norworthy*, 15 Ala. 705; *Law v. Nunn*, 3 Ga. 90; *Smith v. Binder*, 75 Ill. 492; *Pool v. Adkisson*, 1 Dana (Ky.) 110; *Jefts v. York*, 12 Cush. (Mass.) 196; *Garland v. Salem Bank*, 9 Mass. 408, 6 Am. Dec. 86; *Fowler v. Shearer*, 7 Mass. 14, 22; *Cabot v. Shaw*, 148 Mass. 459; *Bailey v. Cornell*, 66 Mich. 107; *Granger v. Hathaway*, 17 Mich. 500; *Shepard v. Sherin*, 43 Minn. 382; *Ashley v. Jennings*, 48 Mo. App. 142; *La Farge v. Kneeland*, 7 Cow. (N. Y.) 456; *Herrick v. Gallagher*, 60 Barb. (N. Y.) 566; *Frye v. Lockwood*, 4 Cow. (N. Y.) 454; *Bixby v. Drexel*, 56 How. Pr. (N. Y.) 478; *Hobensack v. Hallman*, 17 Pa. 154; *Dickins v. Jones*, 6 Yerg. (Tenn.) 483 (holding that money paid to the sheriff for assessed taxes, although a part thereof could not be lawfully assessed, cannot be recovered, especially after the sheriff had paid over the money to the treasury).

²⁵³ *Cabot v. Shaw*, 148 Mass. 459.

²⁵⁴ See *Keener*, *Quasi-Contracts*, 62.

²⁵⁵ *Jefts v. York*, 12 Cush. (Mass.) 196.

him of that protection, the notice to him need only be sufficient to apprise him of what the mistake is, and that by reason of it the party paying it to him intends to reclaim it.²⁵⁶ The notice should be given by the person so paying the money to the agent under a mistake, or by one having authority from him, and not by one having no interest nor authority in the matter.²⁵⁷ Thus, the indorser of a promissory note, ignorant that a demand had not been duly made on the maker, nor due notice given, paid the amount to a bank where it was left by the holder for collection, which amount was passed to the holder's credit by the bank. Within three days the indorser having discovered his mistake, and the money not yet having been paid over, reclaimed it from the company. It was held that the indorser could recover the money from the bank, although after the reclamation they had paid the amount to the holder.²⁵⁸

(d) Where agent's position has changed before notice.—

This rule also applies where, in such a case, the agent has changed his legal position, on the faith of such payment to him, before he has received notice of the mistake, so that it would be detrimental to him to require him to repay the money to the third person from whom he received it.²⁵⁹ If upon the faith of such payment, and without notice that it was made under a mistake of fact, the agent has had certain dealings with his principal which would be prejudiced if the money should be recovered back, the person so paying the money to the agent will not be permitted to recover it. The mere fact, however, that the agent has placed such money to his principal's credit on account, is not such a change in his legal position as will prevent the person, from whom the money was received, from recovering it from the agent, where it was paid under a mistake of fact.²⁶⁰ But if a new credit

²⁵⁶ *Shepard v. Sherin*, 43 Minn. 382.

²⁵⁷ *Shepard v. Sherin*, 43 Minn. 382.

²⁵⁸ *Garland v. Salem Bank*, 9 Mass. 408, 6 Am. Dec. 86.

²⁵⁹ *Buller v. Harrison*, Cowp. 568; *Cox v. Prentice*, 3 Maule & S. 344; *Ellis v. Goulton* [1893] 1 Q. B. 350; *McDonald v. Napier*, 14 Ga. 89.

²⁶⁰ *Buller v. Harrison*, Cowp. 568; *Cox v. Prentice*, 3 Maule & S.

has been given to the principal since the payment, or if bills have been accepted, or if advances have been made on the faith of it, the payment cannot be recovered.²⁶¹

(e) **Where agency was undisclosed.**—If, however, the agent does not act as such but acts for an undisclosed principal, a third person paying money to him under a mistake of fact may recover it from the agent even though he has paid it over to his principal.²⁶²

(f) **Where money was obtained illegally—By fraud.**—Where an agent obtains money from a third person, for his principal, by means of illegal practices, as by compulsion or extortion, he may be held liable therefor, in an action of assumpsit, to such person, even though he has no notice not to pay it over, and he has paid it over to his principal.²⁶³ “If the agent acts in bad faith, or with knowledge of his principal’s want of right to receive the money, or is himself a party to an illegal exaction of the money, or is not authorized by his assumed principal to act for him, as where his power of attorney is a forgery, payment of the money over will be no defense.”²⁶⁴ When one extorts money from another, and is sued for it, he cannot set up in defense that he received

348; *Smith v. Binder*, 75 Ill. 492; *Garland v. Salem Bank*, 9 Mass. 408, 6 Am. Dec. 86.

Crediting the principal in account, and thereupon settling a precedent debt due the agent, after the agent is apprised of a writ of error being issued to reverse the judgment, is not such a payment to the principal as will shield the agent from liability to refund on the judgment being reversed. *Langley v. Warner*, 1 Sandf. (N. Y.) 209.

²⁶¹ *Buller v. Harrison*, Cowp. 568; *Smith v. Binder*, 75 Ill. 492; *Mowatt v. McLelan*, 1 Wend. (N. Y.) 173.

²⁶² *Newall v. Tomlinson*, L. R. 6 C. P. 405; *United States v. Pinover*, 3 Fed. 309; *Smith v. Kelly*, 43 Mich. 390; *Canal Bank v. Albany Bank*, 1 Hill (N. Y.) 287; *Holt v. Ross*, 54 N. Y. 472, 13 Am. Rep. 615.

²⁶³ *Snowdon v. Davis*, 1 Taunt. 359; *Oates v. Hudson*, 6 Exch. 346; *Elliott v. Swartwout*, 10 Pet. (U. S.) 137; *Bocchino v. Cook*, 67 N. J. Law, 467; *Frye v. Lockwood*, 4 Cow. (N. Y.) 456; *Ripley v. Gelston*, 9 Johns. (N. Y.) 201, 6 Am. Dec. 271; *Metcalf v. Denison*, 4 Baxt. (Tenn.) 565.

²⁶⁴ *United States v. Pinover*, 3 Fed. 309.

the money as agent and has paid it over to another as principal. The relation of principal and agent cannot exist for any such purpose.²⁶⁵ And this is also true where an agent receives money for his principal which it is unlawful for him to receive.²⁶⁶ Thus, where a person under fear of an illegal warrant of distress pays money to a bailiff, the latter is personally liable to repay it, though he has paid the amount over to the sheriff.²⁶⁷ So where a collector levies a tonnage duty illegally, and the same is paid compulsorily, he is liable to refund the amount, notwithstanding he has paid over the money to the government, and no notice was given to him not to pay over the amount so collected.²⁶⁸

This rule applies, where it has been obtained by fraud, either of the principal, the agent participating therein, or of the agent, and especially if the fraud is that of the agent alone. In such case, an action for money had and received may be maintained against the agent for its recovery, although it had been paid over to his principal without notice.²⁶⁹ But if the fraud is committed by the principal alone, and the agent is innocent of any knowledge of, or participation therein, notice thereof must be given to the agent before money can be recovered from him by the person paying it; and if he has paid it over to his principal, or any change has taken place in the legal situation of the agent since the payment to him and before such notice, he is not personally liable.²⁷⁰

(g) Where money is to be paid over on the happening of a contingency or performance of a condition.—Where an agent receives money to be paid over only upon the happening of

²⁶⁵ *Bocchino v. Cook*, 67 N. J. Law, 467.

²⁶⁶ *Larkin v. Hapgood*, 56 Vt. 597; *Sharland v. Mildon*, 5 Hare, 469; *Ex parte Edwards*, 13 Q. B. Div. 747.

²⁶⁷ *Snowdon v. Davis*, 1 Taunt. 359.

²⁶⁸ *Ripley v. Gelston*, 9 Johns. (N. Y.) 201, 6 Am. Dec. 271.

²⁶⁹ *Buller v. Harrison*, Cowp. 568; *Shipherd v. Underwood*, 5b Ill. 475; *Moore v. Shields*, 121 Ind. 267; *Hardy v. American Exp. Co.*, 182 Mass. 328; *Seidel v. Peckworth*, 10 Serg. & R. (Pa.) 442; *Wright v. Eaton*, 7 Wis. 595.

²⁷⁰ *Owen v. Cronk* [1895] 1 Q. B. 265; *Herrick v. Gallagher*, 60 Barb. (N. Y.) 566.

a certain contingency or the performance of certain conditions, but he pays it over before such contingency or conditions have happened or been performed, he will be liable therefor to the person who becomes entitled to it, and an action for money had and received may be maintained against him for it.²⁷¹ So if the agent still retains the money in his possession, and the contingency has not happened or the condition performed, it may be recovered from him. Thus, where an agent receives a certain sum, from another, to be applied in payment of rent for the first month in case an agreement for the leasing was finally consummated, and no such agreement is made, the agent may be compelled to return the amount so received.²⁷²

§ 592. For money received from principal for third person.

(a) **In general.**—Where an agent receives money from his principal to be paid to a third person, the mere fact that the agent has received the money, with orders or instructions to pay it to another, does not create a privity between the agent and such other, so as to impose any duty or obligation on the agent to pay the money to him. In order that such a privity may exist, the agent must assent to the appropriation and undertake to carry out the orders and directions of his principal in reference to the payment. Primarily the agent's duty under such circumstances is to his principal alone, and until he has undertaken or promised, expressly or impliedly, to pay over the money to the third person, the principal may at any time revoke the agent's authority to make such payment.²⁷³ Nor can the agent, under such circumstances, be held liable to the third person in an action of assumpsit, for in order that such an action may be main-

²⁷¹ *Edwards v. Hodding*, 5 Taunt. 815; *Burrough v. Skinner*, 5 Burrow, 2639; *Gray v. Gutteridge*, 3 Car. & P. 40; *Furtado v. Lumley*, 6 Times Law R. 168.

²⁷² *Wheeler v. Cannon*, 84 Ill. App. 591.

²⁷³ *Williams v. Everett*, 14 East, 582; *Malcolm v. Scott*, 5 Exch. 601; *Stewart v. Fry*, 7 Taunt. 339; *Brind v. Hampshire*, 1 Mees. & W. 365; *Tiernan v. Jackson*, 5 Pet. (U. S.) 580; *Denny v. Lincoln*, 5 Mass. 385; *Seaman v. Whitney*, 24 Wend. (N. Y.) 260, 35 Am. Dec. 618.

tained there must be some privity between the agent and third person, as by the agent assenting to the appropriation, or otherwise obligating himself expressly or impliedly to pay the money to him.²⁷⁴

But where the agent has assented to or undertaken to make such payment, and has promised, expressly or impliedly, to pay it to the third person so that he is under obligation to the latter, the principal cannot thereafter revoke his orders or directions to the agent; and the agent thereby becomes liable to such person for the money thus appropriated to his use, and if the agent converts it to his own use, or otherwise fails or refuses to pay it over to such person, the latter may maintain an action of assumpsit against him for money had and received to his use.²⁷⁵ Thus, where a principal sent, by letter, a certain amount of money by a bill to his agent with a request that it be paid to certain persons, therein named, to one of which persons the agent refused to act on the letter, though admitting that he had received it, the question was whether the agent by receiving the bill did not accede to the purposes for which it was professedly remitted to him, and bind himself so to apply it, and whether, therefore, the amount of such bill paid to him when due did not instantly become, by operation of law, money had and received for the use of the persons named in the letter, and of course money had and received to the use of the plaintiff, one of such persons. In this connection Lord Ellenborough said: "It will be observed that there is no assent on the part of the defendants to hold this money for the purposes mentioned in the letter; but, on the contrary, an express refusal to the creditor so to do. If, in order to constitute a privity between the plaintiff and defendants as to the subject of this demand, an assent express

²⁷⁴ *Williams v. Everett*, 14 East, 582; *Seaman v. Whitney*, 24 Wend. (N. Y.) 260, 35 Am. Dec. 618.

²⁷⁵ *Crowfoot v. Gurney*, 9 Bing. 372; *Williams v. Everett*, 14 East, 582; *Stevens v. Hill*, 5 Esp. 247; *Walker v. Rostron*, 9 Mees. & W. 411; *Yates v. Hoppe*, 9 C. B. 541; *McLean v. Flicke*, 94 Iowa, 283; *Goodwin v. Bowden*, 54 Me. 424; *Keene v. Sage*, 75 Me. 138; *Freeman v. Otis*, 9 Mass. 272, 6 Am. Dec. 66; *Wyman v. Smith*, 2 Sandf. (N. Y.) 331.

or implied be necessary, the assent can in this case be only an implied one, and that, too, implied against the express dissent of the parties to be charged. By the act of receiving the bill, the defendants agree to hold it till paid, and its contents when paid, for the use of the remitter. It is entire to the remitter to give, and countermand, his own directions respecting the bill as often as he pleases, and the persons to whom the bill is remitted may still hold the bill till received, and its amount when received, for the use of the remitter himself, until by some engagement entered into by themselves with the person who is the object of the remittance, they have precluded themselves from so doing, and have appropriated the remittance to the use of such person. After such a circumstance, they cannot retract the consent they may have once given, but are bound to hold it for the use of the appointee."²⁷⁶ If a person, to whom the money is thus appropriated, requests the agent to pay it to another, it has been held that the latter may maintain such an action against the agent.²⁷⁷

(b) **Assent—Consideration.**—As to what will constitute a sufficient assent or undertaking on the part of the agent to pay the money, so as to create a privity between him and the third person and impose an obligation upon him in favor of the latter, no definite rule can be stated. It is not required that there shall be any definite words or that they shall be given in any particular manner; this assent or undertaking may be either express or implied. All that is necessary is that the assent shall be such as to show an intention on the part of the agent to carry out the principal's orders or directions, and to be willing to obligate himself to the third person to pay the money. And if the agent after receiving the money from the principal for the use of the third person promises the latter to pay it to him, no consideration need pass from such person to the agent in order to support an action on such promise. The money already in the agent's hands and appropriated to the use of the third person is a sufficient consideration for such promise.²⁷⁸

²⁷⁶ *Williams v. Everett*, 14 East, 582.

²⁷⁷ *Keene v. Sage*, 75 Me. 138.

²⁷⁸ *Goodwin v. Bowden*, 54 Me. 424.

II. IN TORT.

§ 593. In general.

It may be stated as a general and well settled principle that every agent is personally responsible for all torts committed by him whereby another is injured; and the fact that he was acting under the directions or on behalf of another at the time of the commission of such tort does not in any way lessen or relieve him from such responsibility. Nor is his liability affected by the fact that the principal also may be liable for the same tort, or by the fact that he acted erroneously, negligently, or willfully. "Every one, whether he is principal or agent, is responsible directly to persons injured by his own negligence in fulfilling obligations resting upon him in his individual character and which the law imposes upon him, independent of contract. No man increases or diminishes his obligations to strangers by becoming an agent. If, in the course of his agency, he comes in contact with the person or property of a stranger, he is liable for any injury he may do to either, by his negligence, in respect to duties imposed by law upon him in common with all other men."²⁷⁹

But, as will be seen in the following sections, a distinction is made between an agent's liability to a third person for such injuries as are caused by nonfeasance, and for those caused by misfeasance or malfeasance. A distinction will also be found to exist between a private agent's liability for his torts and a public agent's liability therefor. These questions will be considered in the following sections, treating first of the liability of private agents and secondly of public agents.

A. Private Agents.

§ 594. For nonfeasance.

Considering first, then, the liability of a private agent for nonfeasance, or in other words for omitting to perform his undertaking, it may be stated that primarily an agent's duty, arising out of the relation is to his principal only. Whether

²⁷⁹ *Delaney v. Rochereau*, 34 La. Ann. 1123, 44 Am. Rep. 456.

or not he will perform the undertaking is a question between himself and his principal alone, and a third person acquires no rights which he can enforce against the agent, by the simple fact that the agent has undertaken to perform certain duties for his principal. If the relation goes no further than the mere contract of agency to perform certain undertakings, there is no duty on the agent's part to third persons or to the public in general. His only duty, in such cases, is to his principal, to carry out his undertaking, and to him only is the agent liable for a failure to do so. "An agent is personally responsible to third parties for doing something which he ought not to have done, but not for not doing something which he ought to have done, the agent, in the latter case, being liable to his principal only. For nonfeasance, or mere neglect in the performance of duty, the responsibility therefor must arise from some express or implied obligation between particular parties standing in privity of law or contract with each other. No man is bound to answer for such violation of duty or obligation except to those to whom he has become directly bound or amenable for his conduct. * * * An agent is not responsible to third persons for any negligence in performance of duties devolving upon him purely from his agency, since he cannot, as agent, be subject to any obligations towards third persons other than those of his principal. Those duties are not imposed upon him by law. He has agreed with no one, except his principal, to perform them. In failing to do so, he wrongs no one but his principal, who alone can hold him responsible."²⁸⁰

It is the general rule, therefore, that for nonfeasance, or mere failure to perform duties which he has engaged to perform, an agent is responsible only to his principal, and that he cannot be held personally liable to third persons for injuries caused thereby; the principal alone being liable to them therefor, the rule of respondeat superior applying in such cases.²⁸¹ Thus, an agent is not personally liable to a third

²⁸⁰ *Delaney v. Rochereau*, 34 La. Ann. 1123, 44 Am. Rep. 456.

²⁸¹ *Lane v. Cotton*, 12 Mod. 472; *Carey v. Rochereau*, 16 Fed. 87; *Reid v. Humber*, 49 Ga. 207; *Dean v. Brock*, 11 Ind. App. 507; *Delaney v. Rochereau*, 34 La. Ann. 1123, 44 Am. Rep. 456; *Brown Paper*

person for resulting loss where, acting as agent of a cotton factor, he fails to communicate to his principal the direction of such third person as to the sale of cotton shipped by him to the factor.²⁸² So an agent who merely carries on a mill for the owner's benefit is not liable for its dam, a permanent structure of which he had neither possession nor control, being maintained at too great a height, whereby the water was set back to the injury of another mill owner.²⁸³ So it seems that the agent will not be responsible for injuries caused to third persons by an omission to perform his duties to his principal, even though such omission be with a malicious intent. Thus it has been held that an agent having charge of a plantation is not liable for damage resulting to the owner of an adjoining plantation, by his failure and refusal to keep open a drain which it was his duty to his principal to keep open, and the fact that he acted maliciously in such neglect and refusal was immaterial.²⁸⁴

A nonfeasance, or failure to enter upon the performance of duties which he owes to his principal, must not be confused with an omission or failure to perform duties which he owes to third persons. Once he enters upon the performance of his contract with his principal, and in doing so he omits or fails to take reasonable care or to do some act which he should do in its performance, whereby a third person is injured, he is as responsible therefor as if he had committed some active wrong.²⁸⁵

Co. v. Dean, 123 Mass. 267; *Bell v. Josselyn*, 3 Gray (Mass.) 309, 63 Am. Dec. 741; *Feltus v. Swan*, 62 Miss. 415; *Bissell v. Roden*, 34 Mo. 63, 84 Am. Dec. 71; *Harriman v. Stowe*, 57 Mo. 93; *Hill v. Caverly*, 7 N. H. 215, 26 Am. Dec. 735; *Denny v. Manhattan Co.*, 2 Denio (N. Y.) 115, 5 Denio, 639; *Crane v. Onderdonk*, 67 Barb. (N. Y.) 47; *Van Antwerp v. Linton*, 89 Hun (N. Y.) 417, affirmed in 157 N. Y. 716; *Murray v. Usher*, 117 N. Y. 542; *Mitchell v. Durham*, 13 N. C. (2 Dev.) 538; *Henshaw v. Noble*, 7 Ohio St. 226; *Drake v. Hagan*, 108 Tenn. 265; *Labadie v. Hawley*, 61 Tex. 177, 48 Am. Rep. 278; *Greenberg v. Whitcomb Lumber Co.*, 90 Wis. 225, 48 Am. St. Rep. 911.

²⁸² *Reid v. Humber*, 49 Ga. 207.

²⁸³ *Brown Paper Co. v. Dean*, 123 Mass. 267.

²⁸⁴ *Feltus v. Swan*, 62 Miss. 415.

²⁸⁵ See post, § 595.

§ 595. For misfeasance.

But where an agent is guilty of misfeasance, that is, where he has actually entered upon the performance of his duties to his principal, and in doing so, fails to respect the rights of others, by doing some wrong, whether it is a wrong of omission or a wrong of commission, as where he fails or neglects to use reasonable care and diligence in the performance of his duties, he will be personally responsible to a third person who is injured by reason of such misfeasance.²⁸⁶ The agent's liability in such cases is not based up-

²⁸⁶ *Lysley v. Clarke*, 14 Eng. Law & Eq. 510; *Perkins v. Smith*, 1 Wils. 328; *Mayer v. Thompson-Hutchison Bldg. Co.*, 104 Ala. 611, 53 Am. St. Rep. 88; *Brownell v. Fisher*, 57 Cal. 150; *Miller v. Staples*, 3 Colo. App. 93; *Bennett v. Ives*, 30 Conn. 329; *Reed v. Peterson*, 91 Ill. 288; *Peck v. Cooper*, 112 Ill. 192, 54 Am. Rep. 231; *Johnson v. Barber*, 10 Ill. 425, 50 Am. Dec. 416; *Baird v. Shipman*, 132 Ill. 16, 22 Am. St. Rep. 504; *Berghoff v. McDonald*, 87 Ind. 549; *McNaughton v. Elkhart*, 85 Ind. 384; *Blue v. Briggs*, 12 Ind. App. 105; *Poole v. Adkisson*, 1 Dana (Ky.) 110; *Campbell v. Hillman*, 15 B. Mon. (Ky.) 508, 61 Am. Dec. 195; *Martin v. Louisville & N. R. Co.*, 95 Ky. 612; *Delaney v. Rochereau*, 34 La. Ann. 1123, 44 Am. Rep. 456; *Richardson v. Kimball*, 28 Me. 463; *Campbell v. Portland Sugar Co.*, 62 Me. 562, 16 Am. Rep. 503; *Hedden v. Griffin*, 136 Mass. 229, 49 Am. Rep. 25; *Osborne v. Morgan*, 130 Mass. 102, 39 Am. Rep. 437; *Weber v. Weber*, 47 Mich. 569; *Josselyn v. McAllister*, 22 Mich. 300; *Starkweather v. Benjamin*, 32 Mich. 306; *Ellis v. McNaughton*, 76 Mich. 237, 15 Am. St. Rep. 308; *Buls v. Cook*, 60 Mo. 391; *Harriman v. Stowe*, 57 Mo. 93; *Martin v. Benoist*, 20 Mo. App. 262; *Lottman v. Barnett*, 62 Mo. 159; *Horner v. Lawrence*, 37 N. J. Law, 46; *Jenne v. Sutton*, 43 N. J. Law, 257, 39 Am. Rep. 578; *Crane v. Onderdonk*, 67 Barb. (N. Y.) 47; *Murray v. Usher*, 117 N. Y. 542; *Suydam v. Moore*, 8 Barb. (N. Y.) 358; *Van Antwerp v. Linton*, 89 Hun (N. Y.) 417, affirmed in 157 N. Y. 716; *Erwin v. Davenport*, 9 Heisk. (Tenn.) 44; *Drake v. Hagan*, 108 Tenn. 265; *Baker v. Wasson*, 53 Tex. 150; *Greenberg v. Whitcomb Lumber Co.*, 90 Wis. 225, 48 Am. St. Rep. 911. One operating a factory as owner and proprietor, so far as the public and the workmen employed are aware, is liable as principal for his negligence, notwithstanding he may have acted as the agent for an undisclosed principal. *Morris v. Malone*, 200 Ill. 132. Where an act done is unlawful, creating a nuisance per se, an agent who actively participated therein is liable alike with his principal. *McNaughton v. Elkhart*, 85 Ind. 384.

on the ground of his agency, but on the ground that he is a wrong-doer, and as such, is responsible for any injury he may cause.

As has been said: "It is not his contract with his principal which exposes him to or protects him from liability to third persons, but his common law obligation to so use that which he controls as not to injure another."²⁸⁷ Thus an agent is guilty of misfeasance in negligently directing water to be admitted to water pipes in a room in a house owned by his principal, but which is under his general management, without first examining the conditions of such pipes by reason of which injury results, and he is liable to the tenant of the shop below for damages therefrom, and the fact that the room in which the pipes are is let to a tenant at that time does not relieve him from liability.²⁸⁸ So an agent is personally liable for illegal distress, where he signs a distress warrant, and after the warrant is issued, and before it is executed, refuses a tender of the rent.²⁸⁹ But where the agent's authority is limited to leasing and collecting rents of premises, of which he has not the possession, he is not liable for the unsafe condition of such premises whereby another is injured.²⁹⁰

**§ 596. Distinction between nonfeasance and misfeasance—
Meaning of terms.**

(a) **In general.**—As has been stated above, there is a distinction between nonfeasance and misfeasance or malfeasance; and this distinction is often of great importance in determining an agent's liability to third persons. By reason of some of the cases failing to clearly notice this distinction there has been some confusion in the decisions on this point. In this connection, nonfeasance means the total omission or failure of an agent to enter upon the performance of some distinct duty or undertaking, which he has agreed with his principal to

²⁸⁷ *Baird v. Shipman*, 132 Ill. 16, 22 Am. St. Rep. 504; *Mayer v. Thompson-Hutchison Bldg. Co.*, 104 Ala. 611, 53 Am. St. Rep. 88.

²⁸⁸ *Bell v. Josselyn*, 3 Gray (Mass.) 309, 63 Am. Dec. 741.

²⁸⁹ *Bennett v. Bayes*, 5 Hurl. & N. 391.

²⁹⁰ *Kuhnert v. Angell*, 10 N. D. 59, 88 Am. St. Rep. 675.

do; misfeasance means the improper doing of an act which the agent might lawfully do, or in other words, it is the performing of his duty to his principal in such a manner as to infringe upon the rights and privileges of third persons; and malfeasance is a doing of an act which he ought not to do at all.²⁹¹ In the following sections the term misfeasance will include malfeasance.

From these meanings, it will be seen that it is not every omission or failure to perform a duty that will constitute a nonfeasance, but only an omission to perform such distinct duties as he owes to his principal, as distinguished from those which he owes to third persons or to the public in general, as a member of society. Nonfeasance does not extend to the omission or failure to do some act whereby a third person is injured, after he has once entered upon the performance of his contractual obligations.

For example, if an agent undertakes to perform certain acts for another and he refuses or fails to enter upon such performance, it is a nonfeasance; but if he once begins the performance of such acts and in doing so fails or omits to do certain acts which he should have done, whereby a third person is injured, it is not a nonfeasance, but a misfeasance. Misfeasance may involve the omission to do something which ought to be done; as where an agent engaged in the performance of his undertaking, omits to do something which it is his duty to do under the circumstances, as when he does not

²⁹¹ Bell v. Josselyn, 3 Gray (Mass.) 309, 63 Am. Dec. 741; Wright v. Spencer, 1 Stew. (Ala.) 576, 18 Am. Dec. 76; Coite v. Lynes, 33 Conn. 109; Greenberg v. Whitcomb Lumber Co., 90 Wis. 225, 48 Am. St. Rep. 911.

The distinction between nonfeasance and misfeasance has been expressed by the courts of New York as follows: "If the duty omitted by the agent or servant devolved upon him purely from his agency or employment, his omission is only of a duty he owes his principal or master, and the master alone is liable. While if the duty rests upon him in his individual character, and was one that the law imposed upon him independently of his agency or employment, then he is liable." Burns v. Pethcal, 75 Hun (N. Y.) 443; Van Antwerp v. Linton, 89 Hun (N. Y.) 417, affirmed in 157 N. Y. 716.

exercise that degree of care which due regard for the rights of others requires.²⁹² As has been said: "If an agent never does anything towards carrying out his contract with his principal, but wholly omits or neglects to do so, the principal is the only person who can maintain an action against him for the nonfeasance, but if the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequences of his acts; and he cannot, by abandoning its execution midway and leaving things in a dangerous condition, exempt himself from liability to any person who suffers injury by reason of having left them without proper safeguards. This is not nonfeasance or doing nothing, but it is misfeasance, doing improperly."²⁹³ Thus negligence and unskillfulness in the management of inflammable gas by reason of which it escapes and causes injury cannot be considered as a mere nonfeasance within the meaning of this rule;²⁹⁴ nor negligence in the control of water;²⁹⁵ or of a draw-bridge;²⁹⁶ or of domestic animals.²⁹⁷

(b) *Illustrations.*—As has been said, there is some confusion in the cases on this subject by reason of the courts failing to clearly observe this distinction between nonfeasance and misfeasance. Thus it has been held that where an agent undertakes the care of a building or property, he is not personally responsible for an injury sustained by a third person by reason of his failure to keep such building or property in safe repair.²⁹⁸ So where an agent having charge of a plantation

²⁹² *Ellis v. McNaughton*, 76 Mich. 237, 15 Am. St. Rep. 308.

²⁹³ *Osborne v. Morgan*, 130 Mass. 102, 39 Am. Rep. 437.

²⁹⁴ *Osborne v. Morgan*, 130 Mass. 102, 39 Am. Rep. 437.

²⁹⁵ *Bell v. Josselyn*, 3 Gray (Mass.) 309, 63 Am. Dec. 741.

²⁹⁶ *Nowell v. Wright*, 3 Allen (Mass.) 166, 80 Am. Dec. 62.

²⁹⁷ *Horner v. Lawrence*, 37 N. J. Law, 46; *Parsons v. Winchell*, 5 Cush. (Mass.) 592, 52 Am. Dec. 745.

²⁹⁸ *Delaney v. Rochereau*, 34 La. Ann. 1123, 44 Am. Rep. 456; *Carey v. Rochereau*, 16 Fed. 87. The failure of an agent employed to look after rent, collect rents, pay taxes, and make the necessary repairs of certain premises, and keep them in a tenantable condition, is nonfeasance of a duty owing his principal, and not mis-

failed and refused to keep open a drain, by reason of which damage resulted to the owner of an adjoining plantation, it was held that the agent was not liable, even though he acted with a malicious intent in such neglect and refusal.²⁹⁹ In other cases, however, it is held that an agent who has the complete control and management of premises, and who is bound to keep them in repair, is liable to a third person for injuries resulting to the latter, while using the premises in an ordinary and appropriate manner, through the negligence of such agent to keep the premises in proper repair.³⁰⁰ Thus, where an agent has entire control of the premises and of the erection of a building for his principal, he is liable for injuries resulting from the removal of a walk on the premises by one of his employes, contrary to his orders, if, after such removal, he knew of the dangerous condition of the premises and allowed them to remain in that condition.³⁰¹ As was said by the court: "To say that he only was guilty of a nonfeasance—an omission of duty to his principal—does not cover the case. He not only omitted a duty he owed to the travelling public, but, by his acts, he increased the danger, and every day committed a wrong, and was guilty of a misfeasance, in keeping this walk torn up, and using it as a driveway, in the execution of a particular work which he had entered upon, and of which he had complete superintendence and control."³⁰²

The cases cited to the first two illustrations seem to be so decided on the theory that the agent's negligence in such cases amounts to nonfeasance, and not misfeasance; but the holdings of the cases cited to the last illustration seem to be sounder on principle, because they consider the agent's neg-

feasance, and does not render an agent liable to a third party. *Dean v. Brock*, 11 Ind. App. 508.

²⁹⁹ *Feltus v. Swan*, 62 Miss. 415.

³⁰⁰ *Baird v. Shipman*, 132 Ill. 16, 22 Am. St. Rep. 503; *Mayer v. Thompson-Hutchison Bldg. Co.*, 104 Ala. 611, 53 Am. St. Rep. 88; *Campbell v. Portland Sugar Co.*, 62 Me. 566, 16 Am. Rep. 503; *Ellis v. McNaughton*, 76 Mich. 237, 15 Am. St. Rep. 308; *Lough v. John Davis & Co.*, 30 Wash. 204.

³⁰¹ *Ellis v. McNaughton*, 76 Mich. 237, 15 Am. St. Rep. 308.

³⁰² *Ellis v. McNaughton*, 76 Mich. 237, 15 Am. St. Rep. 308.

ligence in such case as misfeasance, and rightfully hold him liable therefor. If the distinction above noted is kept clearly in mind by the court, and nonfeasance held to apply only to cases where the agent fails to enter upon the performance of his contractual obligations, and not to cases where he has entered upon such performance but neglected his duties in some respects, this confusion would not arise.³⁰³

In a Massachusetts case where an agent, having a house under his general management, negligently directed water to be admitted to water pipes in a room in such house, without first examining the condition of such, by reason of which injury resulted, the agent was held liable therefor, and the court in rendering its decision said: "The defendant's omission to examine the state of the pipes in the house before causing the water to be let on was a nonfeasance. But if he had not caused the water to be let on, that nonfeasance would not have injured the plaintiff. If he had examined the pipes and left them in a proper condition, and then caused the letting on of the water, there would have been neither nonfeasance nor misfeasance. As the facts are, the nonfeasance caused the act done to be a misfeasance. But from which did the plaintiff suffer? Clearly from the act done, which was no less a misfeasance by reason of its being preceded by a nonfeasance."³⁰⁴ But it is submitted that the judge's remarks in reference to the agent's negligence in omitting to examine the pipes being a nonfeasance were incorrect. To see that the pipes were in safe repair before turning on the water was part of his duty as manager of the house, and his omitting or negligence to perform such duty after he had begun such management was a misfeasance and not a nonfeasance.

In a New York case, where agents were appointed to put certain grounds in condition for a game of foot ball, and in erecting a stand they made the construction so defective that the stand fell and caused the injury complained of, it was held that this negligence on their part constituted nonfeasance and not misfeasance, and the agents were not liable

³⁰³ See *Huffcutt*, Ag. § 212.

³⁰⁴ *Bell v. Josselyn*, 3 Gray (Mass.) 309, 63 Am. Dec. 741.

to the injured parties therefor.³⁰⁵ It is contended, by the writer, that this decision was clearly wrong. When the agents began the erection of the stand, they clearly owed a duty to the public to use due care and diligence therein; and if by a failure to use such care and diligence, the construction was defective, it was clearly a breach of duty which they owed to the public, and hence constituted, not a nonfeasance, or not doing at all, but a misfeasance, or improper doing.

§ 597. Fact of agency or liability of principal no defense.

The fact that the wrong-doer was acting as agent for another at the time he committed the wrong, and that the principal knew of or expressly instructed or directed him in its commission, or that the principal may also be held liable therefor, does not relieve the agent from personal liability for the injuries caused by his wrong doing.³⁰⁶ His obligation to so use that which he controls as not to injure another, "is neither increased nor diminished by his entrance upon the duties of agency, nor can its breach be excused by the plea that his principal is chargeable."³⁰⁷ Thus, where the surveyor of a highway broke open a gate, under an order from the highway board, who wrongfully supposed that the gate was across a public highway, the surveyor was personally liable for the trespass, and the fact that he was bound to obey the order of the board was no defense.³⁰⁸ Nor can he relieve himself from responsibility for his wrongful act by showing that he acted contrary to the instructions of his

³⁰⁵ *Van Antwerp v. Linton*, 89 Hun (N. Y.) 417, affirmed in 157 N. Y. 716. And see *Murray v. Usher*, 117 N. Y. 542.

³⁰⁶ *Lee v. Mathews*, 10 Ala. 682, 44 Am. Dec. 498; *Mayer v. Thompson-Hutchison Bldg. Co.*, 104 Ala. 611, 53 Am. St. Rep. 88; *Johnson v. Barber*, 10 Ill. 425, 50 Am. Dec. 416; *Reed v. Peterson*, 91 Ill. 289; *Peck v. Cooper*, 112 Ill. 192, 54 Am. Rep. 231; *Baird v. Shipman*, 132 Ill. 16, 22 Am. St. Rep. 504; *Wing v. Milliken*, 91 Me. 387, 64 Am. St. Rep. 238; *Weber v. Weber*, 47 Mich. 569; *Josselyn v. McAllister*, 22 Mich. 300; *Hörner v. Lawrence*, 37 N. J. Law, 46; *Baker v. Wasson*, 53 Tex. 150.

³⁰⁷ *Baird v. Shipman*, 132 Ill. 16, 22 Am. St. Rep. 504; *Delaney v. Rochereau*, 34 La. Ann. 1123, 44 Am. Rep. 456.

³⁰⁸ *Mill v. Hawker*, L. R. 10 Exch. 92.

principal.³⁰⁹ Nor will the fact that he committed the wrong innocently, being ignorant of the rights of third persons, and bona fide relying upon the belief that his principal had authority to order the wrong done; for the law does not permit one person to authorize another to do a wrong, and ignorance of the law excuses no one.³¹⁰ For example, if an agent sells liquor in violation of the law, or does any other act which the law prohibits, except under certain conditions, or does any illegal act, whereby another is injured, it will be no defense to him to show that he was acting as the agent for another at the time of the doing of such act.³¹¹

§ 598. Fact that agent received no benefit no defense.

Nor is the fact that the agent derived no benefit from his wrongful act a defense to an action against him by a third person for the injury caused by its commission.³¹²

§ 599. Liability to principal no defense.

Nor is the agent relieved from personal responsibility to a third person for the consequences of his tort, by the fact that his wrongful act also amounts to a breach of contract between himself and his principal, for which the latter may maintain an action against him. The principal's right of action in such a case is founded upon his contract, whereas the third person's cause of action is founded on the agent's tort, or breach of duty to him as a member of society,—two entirely separate causes of action.³¹³

³⁰⁹ *Starkweather v. Benjamin*, 32 Mich. 305; *Johnson v. Barber*, 10 Ill. 425, 50 Am. Dec. 416.

³¹⁰ *Berghoff v. McDonald*, 87 Ind. 549; *Kimball v. Billings*, 55 Me. 147, 92 Am. Dec. 581; *Josselyn v. McAllister*, 22 Mich. 300; *Sprights v. Hawley*, 33 N. Y. 441, 100 Am. Dec. 452; *Crane v. Onderdonk*, 67 Barb. (N. Y.) 47; *Everett v. Coffin*, 6 Wend. (N. Y.) 609, 22 Am. Dec. 551; *Williams v. Merle*, 11 Wend. (N. Y.) 80, 25 Am. Dec. 604.

³¹¹ *Bennett v. Bayes*, 5 Hurl. & N. 391; *Duluth v. Mallett*, 43 Minn. 204; *Temple v. Sumner*, 51 Miss. 13, 24 Am. Rep. 615; *Swagard v. Hancock*, 25 Mo. App. 596; *Wason v. Underhill*, 2 N. H. 505.

³¹² *Weber v. Weber*, 47 Mich. 569; *Wilder v. Beede*, 119 Cal. 646.

³¹³ *Osborne v. Morgan*, 130 Mass. 102, 39 Am. Rep. 437.

§ 600. Liability of agent for conversion.

(a) *In general.*—A good illustration of these principles is where an agent wrongfully takes, holds, or disposes of property belonging to a third person. In such cases he is guilty of a conversion, and may be held personally liable in an action therefor; and it is no defense to such action that he acted in good faith, believing that the goods belonged to his principal, or that he acted as agent under the instructions of his principal, or that he has turned the goods or proceeds over to his principal.³¹⁴ One who intermeddles with or exercises a dominion over personal property in exclusion or defiance of or inconsistent with the owner's right is guilty of a conversion, whether he acts for himself or for another; and it is no defense that he acted on authority from another who had him-

³¹⁴ Perkins v. Smith, 1 Wils. 328; Stephens v. Elwall, 4 Maule & S. 259; McComble v. Davies, 6 East, 538; Lee v. Mathews, 10 Ala. 682, 44 Am. Dec. 498; Marks v. Robinson, 82 Ala. 69; Perminter v. Kelly, 18 Ala. 716, 54 Am. Dec. 177; Gaines v. Briggs, 9 Ark. 46; Merchants & Planters Bank v. Meyer, 56 Ark. 499; Swim v. Wilson, 90 Cal. 126, 25 Am. St. Rep. 110; Miller v. Wilson, 98 Ga. 567, 58 Am. St. Rep. 319; Allen v. Hartfield, 76 Ill. 358; Gravett v. Mugge, 89 Ill. 218; Berghoff v. McDonald, 87 Ind. 549; Warder-Bushnell & Glessner Co. v. Harris, 81 Iowa, 153; Barnhart v. Ford, 37 Kan. 520; Poole v. Adkisson, 1 Dana (Ky.) 110; Kimball v. Billings, 55 Me. 147, 92 Am. Dec. 581; Wing v. Milliken, 91 Me. 387, 64 Am. St. Rep. 238; McPheters v. Page, 83 Me. 234, 23 Am. St. Rep. 772; Coles v. Clark, 3 Cush. (Mass.) 399; Edgerly v. Whalan, 106 Mass. 307; Robinson v. Bird, 158 Mass. 357, 35 Am. St. Rep. 495; Kearney v. Clutton, 101 Mich. 106, 45 Am. St. Rep. 394; Johnson v. Martin, 87 Minn. 370, 94 Am. St. Rep. 706; Koch v. Branch, 44 Mo. 542, 100 Am. Dec. 324; Williams v. Wall, 60 Mo. 322; Bercich v. Marye, 9 Nev. 312; Arthur v. Balch, 23 N. H. 157; Sprights v. Hawley, 39 N. Y. 441, 100 Am. Dec. 452; Everett v. Coffin, 6 Wend. (N. Y.) 603, 22 Am. Dec. 551; Williams v. Merle, 11 Wend. (N. Y.) 80, 25 Am. Dec. 604; Crane v. Onderdonk, 67 Barb. (N. Y.) 47; Bacon v. Sondley, 3 Stroob. (S. C.) 542, 51 Am. Dec. 646.

Where an agent of a mortgagor, by absolute sale, disposed of mortgaged chattels and paid the proceeds, which were sufficient to satisfy both mortgages, to a prior, in exclusion of the rights of a junior, mortgagee, he will be liable to the latter for damages sustained by the wrongful conversion. Merchants & Planters Bank v. Meyer, 56 Ark. 499.

self no authority to dispose of or exercise dominion over such property,³¹⁵ and it is not necessary that he use the proceeds of the conversion for his own benefit.³¹⁶ Thus, where a sewing machine agent, in exchange for a new machine, receives from a married woman another machine and a sum of money, both of which belong to her husband, the latter may maintain an action against him for the conversion of the machine.³¹⁷ So an agent, having possession of goods belonging to another, is guilty of conversion and liable therefor to the true owner of such goods, if he disposes of or in any manner assumes to deal with such goods as though having property therein, without the authority and consent of the true owner;³¹⁸ or if he transfers the possession thereof to his principal, or to any other person than the true owner with notice of the true owner's claim;³¹⁹ or if he unqualifiedly refuses to give up possession of such goods to the true owner on demand.³²⁰ But where his refusal to give up the property is a properly qualified one he will not be liable for conversion;³²¹ as where a freight agent of a railroad company refuses to deliver freight to the consignee thereof until certain charges thereon have been paid, and he makes

³¹⁵ *Stephens v. Elwall*, 4 Maule & S. 259; *McPheters v. Page*, 83 Me. 234, 23 Am. St. Rep. 772; *Wing v. Milliken*, 91 Me. 387, 64 Am. St. Rep. 238; *Kimball v. Billings*, 55 Me. 147, 92 Am. Dec. 581; and see cases cited *supra*, note 314.

³¹⁶ *Koch v. Branch*, 44 Mo. 542, 100 Am. Dec. 324.

³¹⁷ *Rice v. Yocum*, 155 Pa. 538.

³¹⁸ *Consolidated Co. v. Curtis* [1892] 1 Q. B. 495; *Barker v. Furlong* [1891] 2 Ch. 172; *Brown v. Hickinbotham*, 50 Law J. Q. B. 426; *Fowler v. Hollins*, L. R. 7 Q. B. 616; *Miller v. Wilson*, 98 Ga. 567, 58 Am. St. Rep. 319. See *Bowstead's Dig. Ag. art. 134*.

³¹⁹ *Powell v. Hyland*, 6 Exch. 67; *Davis v. Artingstall*, 49 Law J. Ch. 609. Although he may have acted in ignorance of the true owner's title, and in perfect good faith. *Miller v. Wilson*, 98 Ga. 567, 58 Am. St. Rep. 319. See *Bowstead's Dig. Ag. art. 134*.

³²⁰ *Pillott v. Wilkinson*, 3 Hurl. & C. 345; *Wilson v. Anderton*, 1 Barn. & Adol. 450; *Alexander v. Southey*, 5 Barn. & Ald. 247; *Doty v. Hawkins*, 6 N. H. 247, 25 Am. Dec. 459; *Singer Mfg. Co. v. King*, 14 R. I. 511. See *Bowstead's Dig. Ag. art. 134*.

³²¹ *Alexander v. Southey*, 5 Barn. & Ald. 450; *Singer Mfg. Co. v. King*, 14 R. I. 511.

no claim to, and has no possession or control of the property except as agent of the company.³²²

(b) **Other illustrations.**—An agent of one joint owner of a chattel selling the entire chattel is guilty of conversion, whether he had notice of a co-tenant's rights or not, and is liable to an action of trover by a co-tenant, where neither negligence nor any fault whatever is imputable to the plaintiff.³²³ So an agent who sells property received from one who stole it, is guilty of conversion, and is liable to the true owner therefor, although the thief, at the time he delivered to him the property, represented himself to be its owner, and the agent, in good faith, and without notice of the theft, sold the property and paid to the thief the proceeds of sale;³²⁴ and this rule also applies to the agent who acts for the buyer of such property.³²⁵ One who removes furniture from a place where the owner left it to the house occupied by himself and his wife, and uses it in their housekeeping, is liable for its conversion, although he removes it as agent of his wife, and disclaims all right to it himself.³²⁶ A cashier of a bank, though acting for the bank, is liable for repledging or reselling collaterals which the bank was not authorized to pledge or sell.³²⁷ An auctioneer who takes property into his possession from one not the true owner, and sells it in good faith, paying over the proceeds less his commissions,

³²² *McDougall v. Travis*, 24 Hun (N. Y.) 590.

³²³ *Perminter v. Kelly*, 18 Ala. 716, 54 Am. Dec. 177. Where one acts as the agent of a co-tenant in the removal or detention of the common property, he can only be held by proof of such acts on his part as to deprive the co-tenant of the means of locating the property. *Sheffer v. Mudd*, 71 Mo. App. 78.

³²⁴ *Swim v. Wilson*, 90 Cal. 126, 25 Am. St. Rep. 110; *Fort v. Wells*, 14 Ind. App. 531, 56 Am. St. Rep. 316; *Kimball v. Billings*, 55 Me. 147, 92 Am. Dec. 581; *Johnson v. Martin*, 87 Minn. 370, 94 Am. St. Rep. 706; *Koch v. Branch*, 44 Mo. 542, 100 Am. Dec. 324; *Laughlin v. Barnes*, 76 Mo. App. 258; *Thompson v. Irwin*, 76 Mo. App. 418; *Bercich v. Marye*, 9 Nev. 312.

³²⁵ *Fort v. Wells*, 14 Ind. App. 531, 56 Am. St. Rep. 316.

³²⁶ *Edgerly v. Whalan*, 106 Mass. 307.

³²⁷ *Hempfling v. Burr*, 59 Mich. 294.

is liable in trover to the true owner, although he has no knowledge of want of title in the party for whom he sells.³²⁸

But an agent is not liable for a conversion by his principal in which he did not actually participate.³²⁹ Nor is he liable for conversion for refusing to deliver goods sent to him by his principal for others, upon a contract for their sale and delivery made with the principal; the remedy in such case being against the principal.³³⁰ Nor is he liable for conversion where he, in good faith, contracts on behalf of his principal to sell goods of which he has neither possession nor control;³³¹ or where, by authority of the apparent owner and without notice of the claim of the true owner, he deals with the possession of the goods, without assuming to deal with the property therein,³³² as where he receives goods from one in actual, although illegal, possession thereof, and after transporting them redelivers them to such person;³³³ and this would seem to be so, even though the goods thus received were restored to the wrongful possessor, after notice of the claim of the true owner.³³⁴ So an agent is not liable to a third person for conversion, for failing to pay over mon-

³²⁸ *Barker v. Furlong* [1891] 2 Ch. 172; *Cochrane v. Rymill*, 40 Law T. (N. S.) 744; *Consolidated Co. v. Curtis* [1892] 1 Q. B. 495; *Kearney v. Clutton*, 101 Mich. 106, 45 Am. St. Rep. 394; *Robinson v. Bird*, 158 Mass. 357, 35 Am. St. Rep. 495; *Coles v. Clark*, 3 Cush. (Mass.) 399; *Hoffman v. Carow*, 22 Wend. (N. Y.) 285. But see *Turner v. Hockey*, 56 Law J. Q. B. 301; *Rogers v. Hule*, 2 Cal. 571, 56 Am. Dec. 363; *Frizzell v. Rundle*, 88 Tenn. 396, 17 Am. St. Rep. 908. And by analogy a public warehouseman. *Abernathy v. Wheeler*, 92 Ky. 320, 36 Am. St. Rep. 593; *Newcomb-Buchanan Co. v. Baskett*, 14 Bush (Ky.) 658.

³²⁹ *McLennan v. Minneapolis & N. Elev. Co.*, 57 Minn. 317.

³³⁰ *Bradford v. Eastburn*, 2 Wash. C. C. 219, Fed. Cas. No. 1,767.

³³¹ *Barker v. Furlong* [1891] 2 Ch. 172; *Cochrane v. Rymill*, 40 Law T. (N. S.) 744. See *Bowstead's Dig. Ag. art. 134*.

³³² *National Mercantile Bank v. Rymill*, 44 Law T. (N. S.) 767; *Gurley v. Armstead*, 148 Mass. 267, 12 Am. St. Rep. 555.

³³³ *Gurley v. Armstead*, 148 Mass. 267, 12 Am. St. Rep. 555; *Leonard v. Tidd*, 3 Metc. (Mass.) 6; *Strickland v. Barrett*, 20 Pick. (Mass.) 415.

³³⁴ *Gurley v. Armstead*, 148 Mass. 267, 12 Am. St. Rep. 555; *Metcalf v. McLaughlin*, 122 Mass. 84; *Loring v. Mulcahy*, 3 Allen (Mass.) 575.

ey which he has received from such person for his principal, where the fact of the agency and the name of the principal are disclosed.³³⁵ Mere possession of a mortgaged chattel by the mortgagor is not such evidence of ownership, or authority to sell the property, as will protect against the claim of the mortgagee, one who, as agent of the mortgagor, sells the property and pays the proceeds in good faith to his principal, in the belief that he was the true owner.³³⁶

(c) **Modified rule.**—The above rule, holding an agent liable for conversion, undoubtedly works a hardship in some cases, in which the agent acts innocently in making the conversion, as where he acts in good faith, believing that he is acting within the scope of his authority and along the line of his duty. And in some states the above general rule is so modified as to hold that an agent who acts solely for his principal, and by his direction, and without knowing of any wrong, or being guilty of gross negligence in not knowing of it, disposes of, or assists the principal in disposing of, property which the latter has no right to dispose of, is not thereby rendered liable for a conversion of the property.³³⁷ Thus it is held that a public warehouseman receiving, showing, and selling goods, in his line of duty, on commission, and having no property interest in the goods, and having no notice of an adverse claim to them, is not guilty of a conversion of them by the mere sale of them on account of the person that consigns them to him for sale.³³⁸

(d) **Exceptions to general rule.**—In the case, however, of money, or negotiable instruments that pass from hand to hand by mere delivery, without assignment or indorsement, there is an exception to the above general rule. In such cases, if the agent acts in good faith, without negligence, as agent only, and without himself receiving any benefit from the transaction, the fact that he takes such money or negotiable

³³⁵ *Huffman v. Newman*, 55 Neb. 713.

³³⁶ *Sprights v. Hawley*, 39 N. Y. 441, 100 Am. Dec. 452.

³³⁷ *Lenthold v. Fairchild*, 35 Minn. 100. And see *McLennan v. Minneapolis & N. Elev. Co.*, 57 Minn. 317.

³³⁸ *Newcomb-Buchanan Co. v. Baskett*, 14 Bush (Ky.) 658; *Abernathy v. Wheeler*, 92 Ky. 320, 36 Am. St. Rep. 593.

paper from one not the true owner, and transfers them by delivery, and pays over the proceeds to his principal, does not constitute a conversion for which the agent can be held liable in an action of trover.³³⁹

(e) **Measure of damages.**—The measure of damages ordinarily in an action of trover is the value of the property at the time of conversion, with interest from the time when the cause of action accrued.³⁴⁰

§ 601. Liability of agent for personal injuries.

An agent may also be made personally liable to a third person who has sustained some personal injury by reason of the agent's negligence or other wrong.³⁴¹ As has been seen heretofore, when an agent enters on the performance of his undertaking, he owes a duty to the public to use due care and precaution in carrying out such undertaking so as not to injure the person or property of another. If he fails to use such care and by reason thereof another sustains a personal injury, the agent will be responsible therefor. An agent having complete control and management of his principal's business, with power to do what is reasonably neces-

³³⁹ *Spooner v. Holmes*, 102 Mass. 503, 3 Am. Rep. 491. But see *Kimball v. Billings*, 55 Me. 147, 92 Am. Dec. 581, where it is held that it is no defense to an action of trover for property sold by defendant as agent of another, that the property was government bonds payable to bearer, if the principal was not the bona fide purchaser. The court, in this case, says: "There is no rule of law that secures immunity to the agent of the thief in such cases, nor to the agent of one not a bona fide holder. * * * The rule of law protecting bona fide purchasers of lost or stolen notes or bonds payable to bearer has never been extended to persons not bona fide purchasers, nor to their agents."

³⁴⁰ *Wing v. Milliken*, 91 Me. 387, 64 Am. St. Rep. 238; *Washington Ice Co. v. Webster*, 62 Me. 341, 16 Am. Rep. 462; *Glaspy v. Cabot*, 135 Mass. 435; *Johnson v. Sumner*, 1 Metc. (Mass.) 172; and see cases cited supra, note 314.

³⁴¹ *Mayer v. Thompson-Hutchison Bldg. Co.*, 104 Ala. 611, 53 Am. St. Rep. 88; *Stielwel v. Borman*, 63 Ark. 30; *Peck v. Cooper*, 112 Ill. 192, 54 Am. Rep. 231; *Baird v. Shipman*, 132 Ill. 16, 22 Am. St. Rep. 504; *Campbell v. Portland Sugar Co.*, 62 Me. 552, 16 Am. Rep. 503; *Ellis v. McNaughton*, 76 Mich. 237, 15 Am. St. Rep. 308.

sary to protect third persons against injuries from omissions or commissions in the conduct of the same, is under obligation to so use that which he controls as not to injure another, and will be liable in damages to any third person for a failure to discharge such duty.³⁴² An agent charged with the duty of providing safe machines with which his principal's employes were required to work, and who, knowing a machine to be defective and dangerous, put an employe to work therewith, is guilty of misfeasance, for which he is answerable to such employe, if injured thereby.³⁴³

It is especially in this class of cases that some confusion has arisen in the decisions by reason of the court's failure to clearly observe or distinguish between misfeasance and nonfeasance. As has been seen, in some cases it is held that where an agent having charge of property fails to keep it in repair and another is injured by reason thereof, the agent is personally liable for such injury on the ground that his negligence amounted to a misfeasance;³⁴⁴ but in other cases under similar circumstances the agent's negligence is held to be nonfeasance, for which he is not liable.³⁴⁵

§ 602. Liability of agent for fraud and malice.

(a) **In general.**—An agent will be personally liable to a third person for any damage caused to the latter by reason of any fraudulent representations made by such agent on his principal's behalf, if he knows that the representations are false, or makes them in reckless disregard of whether they are true or false; and the fact that he acted as agent, and that his principal may also be liable therefor, does not relieve the

³⁴² *Stiewel v. Borman*, 63 Ark. 30.

³⁴³ *Greenberg v. Whitcomb Lumber Co.*, 90 Wis. 225, 48 Am. St. Rep. 911.

³⁴⁴ *Baird v. Shipman*, 132 Ill. 16, 22 Am. St. Rep. 504; *Campbell v. Portland Sugar Co.*, 62 Me. 552, 16 Am. Rep. 503; *Ellis v. McNaughton*, 76 Mich. 237, 15 Am. St. Rep. 308; *Harriman v. Stowe*, 57 Mo. 93. See ante, § 595.

³⁴⁵ *Dean v. Brock*, 11 Ind. App. 507; *Delaney v. Rochereau*, 34 La. Ann. 1123, 44 Am. Rep. 456; *Feltus v. Swan*, 62 Miss. 415; *Drake v. Hagan*, 108 Tenn. 265. See ante, § 594.

agent from such liability.³⁴⁶ "All persons directly concerned in the commission of a fraud are to be treated as principals. No party can be permitted to excuse himself on the ground that he acted as an agent or servant of another."³⁴⁷ Nor can he defend his fraudulent acts by the fact that he derives no personal benefit from them.³⁴⁸ So where an agent, in selling the property of his principal to another, makes false representations as to his principal's title, he is personally liable therefor;³⁴⁹ and he cannot absolve himself from such liability by the mere fact that he informed the purchaser that his principal derived title under a will which the purchaser had sufficient time and opportunity to examine, where the purchase was made upon the faith of the agent's representation that his principal had a good title, and the repre-

³⁴⁶ *Swift v. Jewsbury*, L. R. 9 Q. B. 301; *Arnot v. Biscoe*, 1 Ves. Sr. 95; *Davis v. Carter*, 3 Times Law R. 88; *Wilder v. Beede*, 119 Cal. 646; *Salmon v. Richardson*, 30 Conn. 360, 79 Am. Dec. 255; *Reed v. Peterson*, 91 Ill. 288; *Allen v. Hartfield*, 76 Ill. 358; *Moore v. Shields*, 121 Ind. 267; *Malchen v. Clay*, 62 Iowa, 452; *Hubbard v. Weare*, 79 Iowa, 678; *Campbell v. Hillman*, 15 B. Mon. (Ky.) 508, 61 Am. Dec. 195; *Hedden v. Griffin*, 136 Mass. 229, 49 Am. Rep. 25; *Weber v. Weber*, 47 Mich. 569; *Hedin v. Minneapolis M. & S. Institute*, 62 Minn. 146, 54 Am. St. Rep. 628; *Clark v. Lovering*, 37 Minn. 120; *Thompson v. Irwin*, 76 Mo. App. 418; *Hamlin v. Abell*, 120 Mo. 188; *White v. New York, S. & W. R. Co.*, 68 N. J. Law, 123; *Westervelt v. Demarest*, 46 N. J. Law, 37, 50 Am. Rep. 400; *Gutchess v. Whiting*, 46 Barb. (N. Y.) 139; *Hecker v. De Groot*, 15 How. Pr. (N. Y.) 314; *Johnson v. Bank of North America*, 5 Rob. (N. Y.) 554; *Fowle v. Kerchner*, 87 N. C. 49; *Kroeger v. Pitcalrn*, 101 Pa. 311, 47 Am. Rep. 718; *Hodges v. New England Screw Co.*, 1 R. I. 312, 53 Am. Dec. 624; *Caulkins v. Gas-Light Co.*, 85 Tenn. 683, 4 Am. St. Rep. 786; *Carpenter v. Lee*, 5 Yerg. (Tenn.) 265; *Baker v. Wasson*, 53 Tex. 150; *Mann v. McVey*, 3 W. Va. 232; *Wright v. Eaton*, 7 Wis. 595. A purchaser of chattels, after having sued the vendor for a breach of warranty in the sale, and been defeated in the action, may bring an action against the agent by whom the sale was made, for a fraud practiced by him on such sale. *Gutchess v. Whiting*, 46 Barb. (N. Y.) 139.

³⁴⁷ *Cullen v. Thompson*, 4 Macq. H. L. Cas. 424.

³⁴⁸ *Caulkins v. Gas-Light Co.*, 85 Tenn. 683, 4 Am. St. Rep. 786; *Weber v. Weber*, 47 Mich. 569.

³⁴⁹ *Campbell v. Hillman*, 15 B. Mon. (Ky.) 508, 61 Am. Dec. 195; *Thompson v. Irwin*, 76 Mo. App. 418.

sentation was calculated to induce belief and prevent further inquiry.³⁵⁰ So, where such an agent makes false representations as of his own knowledge, as to the character and condition of the property, which are relied upon by a purchaser, to his prejudice, the purchaser may maintain an action against him for damages.³⁵¹ The directors of an insurance company are personally liable to an assured who, by reason of the insolvency of the company, has been unable to recover upon his policy, where they have fraudulently made and published false representations as to the financial condition of the company, whereby the plaintiff was induced to insure therein; and it is no defense that they were acting officially, or that there was no privity of contract between them and the plaintiff.³⁵²

(b) **Innocent misrepresentations.**—If, however, the agent makes false representations on behalf of his principal honestly believing them to be true, the mental element of fraud is lacking and he is not guilty of fraud and not liable for such, although his principal may have known that such representations were false.³⁵³ In order that an agent may be held liable for fraud there must be some fraudulent intent to deceive, in the circumstances of the particular case.³⁵⁴ But it is not necessary that this intent should be an actual or express one, but it may be inferred from the circumstances of the case, as where he makes the false representations in ignorance of the true state of facts, where such ignorance is the result of his own default in failing to inform himself of matters which it was his duty to be informed upon.³⁵⁵ A common illustration

³⁵⁰ *Campbell v. Hillman*, 15 B. Mon. (Ky.) 508, 61 Am. Dec. 195.

³⁵¹ *Clark v. Lovering*, 37 Minn. 120.

³⁵² *Salmon v. Richardson*, 30 Conn. 360, 79 Am. Dec. 255.

³⁵³ *Pollock*, Torts (6th Ed.) 297; *Jaggard*, Torts, 286; *Eaglesfield v. Londonderry*, 38 Law T. (N. S.) 303; *Campbell v. Hillman*, 15 B. Mon. (Ky.) 508, 61 Am. Dec. 195.

³⁵⁴ *Derry v. Peek*, 14 App. Cas. 337; *Pasley v. Freeman*, 3 Term R. 51; *Weir v. Bell*, 3 Exch. Div. 238; *Hedin v. Minneapolis M. & S. Institute*, 62 Minn. 146, 54 Am. St. Rep. 628; *Cowley v. Smyth*, 46 N. J. Law, 380, 50 Am. Rep. 432.

³⁵⁵ *Arnison v. Smith*, 41 Ch. Div. 348; *Hubbard v. Weare*, 79 Iowa, 678; *Hedin v. Minneapolis M. & S. Institute*, 62 Minn. 146, 54 Am. St. Rep. 628; *Kinkler v. Junica*, 84 Tex. 116.

of this rule is where an agent fraudulently undertakes to do certain acts on behalf of another without authority therefor. As has been seen heretofore, if an agent expressly makes a false representation as to his authority, or if he assumes to act as having authority when he knows he has not, he may be held personally liable to the injured party in action on the case for whatever damage such person has sustained thereby.³⁵⁶ If, however, there has not been an express false representation as to the authority, but the agent acted under the honest belief that he possessed the authority which he assumed to exercise, he will not be personally liable in action on the case, but only in an action of assumpsit for breach of implied warranty of authority.³⁵⁷

(c) **Necessity of injury.**—It is only where the agent's fraud has resulted in injury to another that an action for such fraud can be maintained against him. However fraudulent the agent's acts may have been, if the plaintiff cannot show that he has suffered some injury by reason of such fraud, his action therefor cannot be maintained.³⁵⁸ Thus, if a purchaser of land is not injured by a real estate agent's misrepresentations or concealments, he has no cause of action against the agent.³⁵⁹

(d) **Malice.**—The same rules apply to malicious acts committed by agent whereby another is injured.³⁶⁰ Thus, a person may be held personally responsible for injuries resulting

³⁵⁶ *Duncan v. Niles*, 32 Ill. 532, 83 Am. Dec. 293; *Union School Tp. v. First Nat. Bank*, 102 Ind. 464; *McHenry v. Duffield*, 7 Blackf. (Ind.) 41; *Noyes v. Loring*, 55 Me. 408; *Teele v. Otis*, 66 Me. 329; *Ballou v. Talbot*, 16 Mass. 461, 8 Am. Dec. 146.

³⁵⁷ See ante, § 586.

³⁵⁸ *Baker v. Brown*, 82 Cal. 64; *Hedin v. Minneapolis M. & S. Institute*, 62 Minn. 146, 54 Am. St. Rep. 628; and see cases cited in preceding notes of this section.

³⁵⁹ *Baker v. Brown*, 82 Cal. 64.

³⁶⁰ *Warfield v. Campbell*, 35 Ala. 349; *Wright v. Wilcox*, 19 Wend. (N. Y.) 343, 32 Am. Dec. 507; *Wallace v. Finberg*, 46 Tex. 35; *Porter v. Mack*, 50 W. Va. 581. Compare *Feltus v. Swan*, 62 Miss. 415, where the agent was held not liable for an act of negligence, although it was done maliciously, on the ground that such act was nonfeasance.

to another from a malicious prosecution instituted by him, although he was acting as agent in bringing the suit.³⁶¹

§ 603. Liability of agent for misfeasance of subagent.

Whether or not an agent is liable for the wrongs of a subagent depends upon whether or not the subagent is considered his agent in the particular transaction, or whether or not he has in some way participated in the wrong. When a subagent is the agent of the agent only, and when he is the agent of the principal, has been considered in a former chapter.³⁶² If in accordance with the rules there laid down it is determined that the subagent is the agent of the initial agent only, and not of the principal, then such agent may be held personally responsible for the torts, whether of omission or commission, of his agent (the subagent) committed by the latter in the course of his agency.³⁶³ His liability in such cases is governed by the same rules as those governing the liability of any other principal for the torts of his agent.³⁶⁴ But where, in accordance with those rules, it is determined that the subagent is the agent of the principal only, and not of the initial agent, the latter is not liable for such subagent's wrongs unless he has been guilty of fraud or negligence in employing him or unless he has authorized or participated in the commission of such wrongs.³⁶⁵ Thus, where the president of an incorporated omnibus company issued an order to the drivers to exclude all colored persons, he was individually liable for the ejection and personal injury of a colored person by a driver.³⁶⁶ But an agent who

³⁶¹ *Carraher v. Allen*, 112 Iowa, 168; *Warfield v. Campbell*, 35 Ala. 349.

³⁶² See ante, §§ 341-347.

³⁶³ Where an agent acts as principal in a transaction and incurs liabilities through the fraud of his agent, he is not relieved from liability by the fact that he was agent in the transaction, and was not benefited personally by the fraud. *Wilder v. Beede*, 119 Cal. 646.

³⁶⁴ See ante, §§ 491-519.

³⁶⁵ *Stone v. Cartwright*, 6 Term R. 411; *Cargill v. Bower*, 10 Ch. Div. 502; *Bear v. Stevenson*, 30 Law T. (N. S.) 177; *Peck v. Cooper*, 112 Ill. 192, 54 Am. Rep. 231; *Brown v. Lent*, 20 Vt. 529.

³⁶⁶ *Peck v. Cooper*, 112 Ill. 192, 54 Am. Rep. 231.

leases lands and collects the rents for a nonresident owner is not liable for the unsafe condition of a fence on the property which his principal instructs him to have built and which is constructed by a subagent, whom it was necessary for him to employ, and in whose selection he used reasonable diligence.³⁶⁷

— **Liability of subagent.** As to whether or not a subagent is himself personally liable for his torts, whether nonfeasance or misfeasance, the rules heretofore considered in reference to agents apply; for when considering the liability of the subagent himself, he is viewed in the same light as any other agent. If he has been guilty of any misfeasance, he is personally liable to the third person injured thereby, although the principal or primary agent may also be liable.³⁶⁸ And in accordance with the above rules a subagent would not be personally liable for mere nonfeasance.

§ 604. Liability of agent to subagent—Principal undisclosed.

Where an agent employs a subagent without disclosing his principal, he is liable to such subagent for injuries received while acting as agent for the ostensible principal, to the same extent as if he were in fact the real instead of the ostensible principal.³⁶⁹

§ 605. As to joint liability of principal and agent.

As to whether or not the principal and agent are jointly liable for the torts of the agent committed on behalf of the principal, the authorities are not entirely in harmony. Of course, if they are in fact joint tortfeasors, as in cases of trespass, or where the principal orders or actually participates in the wrong, the two are jointly liable and may be sued jointly.³⁷⁰ But where they are not in fact joint tort

³⁶⁷ Kuhnert v. Angell, 10 N. D. 59, 88 Am. St. Rep. 675.

³⁶⁸ Stone v. Cartwright, 6 Term R. 411; Bush v. Steinman, 1 Bos. & P. 404; Rapson v. Cubitt, 9 Mees. & W. 710.

³⁶⁹ Malone v. Morton, 84 Mo. 436; Morris v. Malone, 200 Ill. 132.

³⁷⁰ Moore v. Fitchburg R. Corp., 4 Gray (Mass.) 465, 64 Am. Dec. 83; Hewett v. Swift, 3 Allen (Mass.) 420; Roberts v. Johnson, 58 N. Y. 613.

feasors, as where the principal is held liable for the agent's torts, committed in the course of his agency, on the ground that he is principal and therefore responsible for all his acts committed within the scope of his authority, the decisions are somewhat conflicting. In some cases of this kind, it is held that although the principal may be sued for the agent's torts, or the agent himself may be sued for them, a joint action therefor cannot be brought against them both.³⁷¹ It is believed, however, that the weight of authority holds to the other view, and that where the principal and agent may be sued severally for the agent's torts, they may be sued jointly.³⁷² Thus, one who superintends the construction of a building as agent of the contractor corporation, although he may be, in fact, an officer of the corporation, is jointly liable with the contractor, in an action on the case, for an injury to a third person, resulting from culpable negligence in the construction of the walls of the building.³⁷³ So where two are sued for the conversion of goods who reside in different counties, the one having acted as the agent of the other in receiving and converting the goods, suit may be brought against both in the county where the agent resides.³⁷⁴ And it has been held that a judgment against the principal, though unsatisfied, is a bar to any action against the agent in respect to the same wrong.³⁷⁵

§ 606. Application of these rules to officers and agents of corporations.

As may be seen from some of the illustrations given in the

³⁷¹ *Campbell v. Portland Sugar Co.*, 62 Me. 552, 16 Am. Rep. 503; *Parsons v. Winchell*, 5 Cush. (Mass.) 592, 52 Am. Dec. 745.

³⁷² *Mayer v. Thompson-Hutchison Bldg. Co.*, 104 Ala. 611, 53 Am. St. Rep. 88; *Shearer v. Evans*, 89 Ind. 400; *Phelps v. Wait*, 30 N. Y. 78; *Wright v. Wilcox*, 19 Wend. (N. Y.) 343, 32 Am. Dec. 507; *Weber v. Weber*, 47 Mich. 569; *Parlin & Orendorff Co. v. Miller*, 25 Tex. Civ. App. 190; *Greenberg v. Whitcomb Lumber Co.*, 90 Wis. 225, 48 Am. St. Rep. 911. And see *White v. Sawyer*, 16 Gray (Mass.) 586.

³⁷³ *Mayer v. Thompson-Hutchison Bldg. Co.*, 104 Ala. 611, 53 Am. St. Rep. 88.

³⁷⁴ *Shearer v. Evans*, 89 Ind. 400.

³⁷⁵ *Brinsmead v. Harrison*, L. R. 7 C. P. 547.

preceding sections, the rules heretofore set forth as to the liability of an agent for torts, in general, apply as well to officers and agents of private corporations as to agents of private individuals. An officer or agent of a private corporation is not personally liable for torts that consist in mere nonfeasance, that is, a failure to perform the duties which such officer or agent, as such, owes to the corporation. But if such officer or agent enters upon the performance of his duties he is personally liable for all torts committed by him, consisting in misfeasance, as fraud, conversion, acts done negligently, etc., notwithstanding he may have acted as the agent and under directions of the corporation; and the fact that the circumstances are such as to render the corporation liable is immaterial, the person injured may hold either liable, and generally he may hold both as joint tortfeasors.³⁷⁶ For example, the directors, trustees, or other officers or agents of a corporation are liable for fraud committed by them, and the fact that they were acting solely for the corporation and were not personally benefited by the fraud, is immaterial.³⁷⁷ Thus the directors of a corporation are liable in an action for deceit where they make false and fraudulent representations in a prospectus, report, or otherwise, and thereby induce the public to subscribe for or purchase shares of its stock, and a person in reliance upon such representations subscribes for or purchases shares and is thereby injured.³⁷⁸

³⁷⁶ *Cowley v. Smyth*, 46 N. J. Law, 380, 50 Am. Rep. 432; *Morgan v. Skiddy*, 62 N. Y. 319. And see cases cited in following notes.

³⁷⁷ *Richardson v. Williamson*, L. R. 6 Q. B. 276; *Brady v. Evans*, 78 Fed. 558, 24 C. C. A. 236; *Schley v. Dixon*, 24 Ga. 273, 71 Am. Dec. 121; *Delano v. Case*, 121 Ill. 244, 2 Am. St. Rep. 81; *Hubbard v. Weare*, 79 Iowa, 678; *Pieratt v. Young*, 20 Ky. L. R. 1815, 49 S. W. 964; *Bank of Atchison County v. Byers*, 139 Mo. 627; *Clark v. Edgar*, 84 Mo. 106, 54 Am. Rep. 84; *Gerner v. Mosher*, 58 Neb. 135; *Hammond v. Hussey*, 51 N. H. 40, 12 Am. Rep. 41; *Vreeland v. New Jersey Stone Co.*, 29 N. J. Eq. 188; *Tate v. Bates*, 118 N. C. 287, 54 Am. St. Rep. 719; *Solomon v. Bates*, 118 N. C. 311, 54 Am. St. Rep. 725; *Houston v. Thornton*, 122 N. C. 365, 65 Am. St. Rep. 699; *Seale v. Baker*, 70 Tex. 283, 8 Am. St. Rep. 592; *Zinn v. Mendel*, 9 W. Va. 580. And see *Clark & M. Corp.* 2263 et seq.

³⁷⁸ *Bagshaw v. Seymour*, 18 C. B. 903; *Watson v. Earl of Charlemont*, 12 Q. B. 856; *Tyler v. Savage*, 143 U. S. 79; *Dorsey Machine*

And the same is true in case of an officer who signs and issues fictitious certificates of stock to purchasers or pledgees who are thereby injured.³⁷⁹

It is necessary, however, in order that a particular director or officer may be held personally liable in such or similar cases, that he shall have actually participated in the fraud.³⁸⁰ They cannot be held personally liable for false representations made by brokers employed on behalf of the corporation, if they have not authorized or in any way participated in such fraud.³⁸¹ So, notwithstanding an officer or agent of a corporation may be acting on behalf of the corporation, he is personally liable for conversion of property of a third person, in disposing of or otherwise exercising dominion over it;³⁸² or for a nuisance erected or maintained by him;³⁸³ or for a trespass committed by him, or under his direction, upon the land or goods of another;³⁸⁴ or for a libel, if he participates in its publication, though merely as officer or agent.³⁸⁵

§ 607. Criminal responsibility of agent.

It is well settled that if an agent commits a crime in the course of his employment, he is criminally responsible there-

Co. v. McCaffrey, 139 Ind. 545, 47 Am. St. Rep. 290; Hubbard v. Weare, 79 Iowa, 678; Hornblower v. Crandall, 78 Mo. 581; Gerner v. Mosher, 58 Neb. 135; Vreeland v. New Jersey Stone Co., 29 N. J. Eq. 188; Brewster v. Hatch, 122 N. Y. 349, 19 Am. St. Rep. 498; Miller v. Barber, 66 N. Y. 558; Paddock v. Fletcher, 42 Vt. 389.

³⁷⁹ Windram v. French, 151 Mass. 547; Huntington v. Attrill, 118 N. Y. 365; Bruff v. Mall, 36 N. Y. 200.

³⁸⁰ Weir v. Barnett, 3 Exch. Div. 32; Arthur v. Griswold, 55 N. Y. 400; Wakeman v. Dalley, 51 N. Y. 27, 10 Am. Rep. 551.

³⁸¹ Weir v. Barnett, 3 Exch. Div. 32; Arthur v. Griswold, 55 N. Y. 400.

³⁸² Hollins v. Fowler, L. R. 7 H. L. 757; and see Clark & M. Corp. 2266.

³⁸³ Cameron v. Kenyon-Connell Commercial Co., 22 Mont. 312, 74 Am. St. Rep. 602; Nunnally v. Southern Iron Co., 94 Tenn. 397.

³⁸⁴ Favorite v. Cottrill, 62 Mo. App. 119; Bates v. Van Pelt, 1 Tex. Civ. App. 185.

³⁸⁵ See A. H. Belo & Co. v. Fuller, 84 Tex. 450, 31 Am. St. Rep. 75; Washington Gaslight Co. v. Lansden, 172 U. S. 534. For full treatment of this subject, see Clark & M. Corp. § 745.

for. The fact that the act was done by authority, direction, or command of his principal, is no defense whatever, for a person cannot authorize another to do what he cannot lawfully do himself.³⁸⁶ Thus, where a person obtains money or property from another by false pretenses, with intent to defraud, he cannot escape responsibility on the ground that he was acting as the agent of another;³⁸⁷ and the same is true where an agent sells intoxicating liquors in violation of law,³⁸⁸ or keeps a gaming house, operates a gaming device, or permits gaming;³⁸⁹ or obstructs a highway;³⁹⁰ or engages in any other business or does any other act without a license or that is otherwise in violation of the law.³⁹¹ But under an indictment for selling spirituous liquors without a license, and contrary to law, an agent cannot be convicted, if he had no interest in the liquor sold, nor in the money paid for it, but in good faith acted only as agent or friend of the purchaser in procuring the liquor with the money furnished by the latter, as in such case the agent cannot be considered as a seller within the statute.³⁹²

³⁸⁶ *Winter v. State*, 30 Ala. 22; *Smith v. District of Columbia*, 12 App. D. C. 33; *Douglass v. State*, 18 Ind. App. 289; *Commonwealth v. Hadley*, 11 Metc. (Mass.) 66; *Hays v. State*, 13 Mo. 246; *Atkins v. State*, 95 Tenn. 474; *Sanders v. State*, 31 Tex. Cr. App. 525. And see *Clark & M. Crimes*, 407.

³⁸⁷ *State v. Chingren*, 105 Iowa, 169.

³⁸⁸ *Winter v. State*, 133 Ala. 176; *Penner v. Commonwealth*, 23 Ky. L. R. 774, 64 S. W. 435; *Commonwealth v. Hadley*, 11 Metc. (Mass.) 66; *Johnson v. State*, 63 Miss. 228; *State v. Brown*, 93 Mo. App. 543; *State v. Lucas*, 94 Mo. App. 117; *Vincent v. State* (Tex. Cr. App.) 55 S. W. 819. Or to personally solicit orders for the sale of intoxicating liquors in a county where the sale of such liquors is prohibited by law. *Loeb v. State*, 115 Ga. 241.

³⁸⁹ *Stevens v. People*, 67 Ill. 587; *Atkins v. State*, 95 Tenn. 474.

³⁹⁰ *Smith v. District of Columbia*, 12 App. D. C. 33; *Sanders v. State*, 31 Tex. Cr. R. 525.

³⁹¹ *Nashville, C. & St. L. R. Co. v. Attalla*, 118 Ala. 362.

³⁹² *Maples v. State*, 130 Ala. 121; *Bonds v. State*, 130 Ala. 117; *Du Bois v. State*, 87 Ala. 101; *Campbell v. State*, 79 Ala. 271; *Anderson v. State*, 32 Fla. 242; *Evans v. State*, 101 Ga. 780; *Cunningham v. State*, 105 Ga. 676; *Black v. State*, 112 Ga. 29; *Bourman v. Commonwealth*, 14 Ky. L. R. 174; *Skidmore v. Commonwealth*, 22 Ky. L. R. 409, 57 S. W. 468; *State v. Taylor*, 89 N. C. 577;

*B. Public Agents.***§ 608. In general—For breach of duty owing to public only.**

For a wrong done by a public agent which constitutes only a breach of duty to the public, as such, and results in an injury to the public only, such agent is liable only to the public by a public prosecution; and a private individual cannot maintain an action against him therefor, unless he can show that he has sustained some special or particular injury by reason of such wrong.³⁹³ For a misbehavior of a public agent in his office, either from misfeasance or nonfeasance, no one can maintain an action against him, unless he can show a special and particular damage to himself.³⁹⁴ Thus, it has been held that a public agent is not liable to a member of a foreign state for an injury caused by an act authorized or ratified by the government.³⁹⁵

§ 609. For tort committed in breach of duty to private individuals.

But where a wrong is committed by a public agent, whether a subordinate or superior agent, in his private individual

Bowman v. State (Tex. Cr. App.) 35 S. W. 382; *Treue v. State* (Tex. Cr. App.) 44 S. W. 829. Under an indictment for selling or giving spirituous liquor to a minor, a conviction cannot be had against a person, who, not being interested in the sale of the liquor, purchased a pint for the minor, with money furnished for the purpose by the latter. *Bryant v. State*, 82 Ala. 51. But see *Foster v. State*, 45 Ark. 361, holding that, where a party, with the money of a minor, purchases liquor for him, he is not only an agent of the minor for the purchase, which is not punishable, but he is also an aider and procurer of the sale, and therefore punishable as a principal in violating the statute inhibiting sales to minors.

³⁹³ *Butler v. Kent*, 19 Johns. (N. Y.) 223, 10 Am. Dec. 219; *Bartlett v. Crozier*, 17 Johns. (N. Y.) 449, 8 Am. Dec. 428; *Moss v. Cummings*, 44 Mich. 359. A civil action cannot be maintained against an overseer of highways on behalf of an individual for an injury sustained by him in consequence of the neglect of the overseer to keep a bridge in repair. *Bartlett v. Crozier*, 17 Johns. (N. Y.) 449, 8 Am. Dec. 428.

³⁹⁴ *Butler v. Kent*, 19 Johns. (N. Y.) 223, 10 Am. Dec. 219.

³⁹⁵ *Buron v. Denman*, 2 Exch. 167.

capacity or where it is a breach of duty to a private individual, he is liable for injuries caused thereby, the same as any other agent would be; and the fact that he is a public agent will be no defense.³⁹⁶ Where a public agent is guilty of direct misfeasance or positive wrongs to third persons in the discharge of their official functions, they incur the same personal responsibility as private agents.³⁹⁷ "This is founded upon a very plain principle of common sense and common justice; and that is, that no person shall shelter himself from personal liability, who does a wrong, under color of, but without any authority, or by an excess of his authority, or by a negligent use or abuse of his authority. Where a person is clothed with authority, as a public agent, it cannot be presumed, that the government means to justify, or even to excuse, his violations of his own proper duty, under color of that authority. And, in cases of this sort, it is not sufficient for public agents to show, that they have acted bona fide, and to the best of their skill and judgment; for they are bound also to conduct themselves with reasonable skill and diligence in the execution of their trust."³⁹⁸ A public contractor engaged to keep a canal in repair is liable to one whose boat and furniture were injured while passing through lock-gates, in consequence of their defective repair.³⁹⁹ A tax collector is liable for a false return of

³⁹⁶ *Rowning v. Goodchild*, 3 Wils. 443; *Leader v. Moxton*, 3 Wils. 461; *Ex parte Martin*, 13 Ark. 198, 58 Am. Dec. 321; *State v. Harris*, 89 Ind. 363, 46 Am. Rep. 169; *Hayes v. Porter*, 22 Me. 371; *Tyler v. Alford*, 38 Me. 530; *Nowell v. Wright*, 3 Allen (Mass.) 166, 80 Am. Dec. 62; *Moss v. Cummings*, 44 Mich. 359; *Piercy v. Averill*, 37 Hun (N. Y.) 360; *Robinson v. Chamberlain*, 34 N. Y. 389, 90 Am. Dec. 713; *Bennett v. Whitney*, 94 N. Y. 302; *Hover v. Barkhoof*, 44 N. Y. 113; *Kinnard v. Willmore*, 2 Heisk. (Tenn.) 619; *City of Richmond v. Long*, 17 Grat. (Va.) 375, 94 Am. Dec. 461; *Sawyer v. Corse*, 17 Grat. (Va.) 230, 94 Am. Dec. 445.

³⁹⁷ *Fitzgerald v. Burrill*, 106 Mass. 446; *Bailey v. City of New York*, 3 Hill (N. Y.) 531, 38 Am. Dec. 669.

³⁹⁸ *Story*, Ag. § 320; *Jones v. Bird*, 5 Barn. & Ald. 837.

³⁹⁹ *Robinson v. Chamberlain*, 34 N. Y. 389, 90 Am. Dec. 713; *Fulton Fire Ins. Co. v. Baldwin*, 37 N. Y. 649. So a superintendent of repairs on canals. *Adsit v. Brady*, 4 Hill (N. Y.) 630, 40 Am. Dec. 305.

nulla bona, whereby the owner of a mortgage of lands is compelled to redeem from a tax sale.⁴⁰⁰

But it is not every person who sustains an injury from the negligence (or other wrong) of a public officer or agent that can maintain an action therefor. He is liable only to the person to whom the particular duty is owing, and the ruling question in all cases of this kind is as to whether the plaintiff shows the breach of a particular duty owing to him. It is not sufficient to show a general public duty, or a duty to some other person directly interested.⁴⁰¹ Thus "no action lies against a sheriff, either for his own default, or for that of his deputy, but at the suit of one to whom the sheriff is bound by the duty of his office. In relation to a suit pending, whether in the service of the original writ, the execution, or any intermediate process, he is answerable for his neglects to none but the plaintiff or the defendant in such suit."⁴⁰² So where a recorder gives an erroneous certificate, an action can be maintained only by the person to whom it was given.⁴⁰³

§ 610. For torts of official subordinates.

(a) *In general.*—The doctrine of respondeat superior does not in general apply to public agents or officers, including all grades of officers whose trust proceeds from and whose responsibility is due to the government, and they are not personally liable for the misfeasance or nonfeasance of their

⁴⁰⁰ *Raynsford v. Phelps*, 43 Mich. 342, 38 Am. Rep. 189.

⁴⁰¹ *State v. Harris*, 89 Ind. 363, 46 Am. Rep. 169; *Strong v. Campbell*, 11 Barb. (N. Y.) 135; *Ware v. Brown*, 2 Bond, 267, Fed. Cas. No. 17,170. No action will lie in behalf of publishers of a newspaper, against a postmaster, for a breach of duty in refusing to receive the proofs offered by them in regard to the circulation of their paper, and to give them the publishing of the list of letters remaining in the postoffice, according to the act of congress and the instructions of the postmaster general, whereby they lost the employment, and the gains and profits arising therefrom. *Strong v. Campbell*, *supra*.

⁴⁰² *Harrington v. Ward*, 9 Mass. 251. And see *Bank of Rome v. Mott*, 17 Wend. (N. Y.) 554.

⁴⁰³ *Houseman v. Girard Mut. B. & L. Ass'n*, 81 Pa. 256; *Wood v. Ruland*, 10 Mo. 143.

official subordinates, while in discharge of their official duties;⁴⁰⁴ unless, where appointed or removed by them, they have been guilty of negligence in selecting, appointing, or retaining improper or unfit subordinates,⁴⁰⁵ or in superintending them in the discharge of their official duties;⁴⁰⁶ or unless they have in some way participated in the subordinate's tort.⁴⁰⁷ "Their immunity from all liability for the misconduct, negligence, and omissions of their subordinates rests upon motives of public policy, the necessities of the public service, and the perplexities and embarrassments of a contrary doctrine."⁴⁰⁸ "With regard to the responsibility of a public officer for the misconduct or negligence of those employed by or under him, the distinction generally turns upon the question whether the persons employed are his servants, employed voluntarily or privately and paid by him, and responsible to him, or whether they are his official subordinates, nominated perhaps by him, but officers of the government; in other words, whether the situation of the inferior is a public officer or private service. In the former case the official superior is not liable for the inferior's acts; in the latter he is."⁴⁰⁹

(b) **Postmaster-general, etc.**—In accordance with this rule, the law is well settled, that the postmaster-general, the deputy postmasters, and their assistants and clerks, appointed and sworn as required by law, are public officers, each of whom is

⁴⁰⁴ *Lane v. Cotton*, 1 *Ld. Raym.* 646; *Whitfield v. Le Despencer*, *Cowp.* 754; *Nicholson v. Mounsey*, 15 *East*, 384; *Dunlop v. Monroe*, 7 *Cranch* (U. S.) 242; *Ely v. Parsons*, 55 *Conn.* 83; *Conwell v. Voorhees*, 13 *Ohio*, 523, 42 *Am. Dec.* 206; *Richmond v. Long's Adm'rs*, 17 *Grat. (Va.)* 375, 94 *Am. Dec.* 461; *Sawyer v. Corse*, 17 *Grat. (Va.)* 230, 94 *Am. Dec.* 445; *Tracy v. Cloyd*, 10 *W. Va.* 19.

⁴⁰⁵ *Bishop v. Williamson*, 11 *Me.* 495; *Wiggins v. Hathaway*, 6 *Barb. (N. Y.)* 632; *Conwell v. Voorhees*, 13 *Ohio*, 523, 42 *Am. Dec.* 206; *Schroyer v. Lynch*, 8 *Watts (Pa.)* 453; *Richmond v. Long*, 17 *Grat. (Va.)* 375, 94 *Am. Dec.* 461.

⁴⁰⁶ *Dunlop v. Monroe*, 7 *Cranch* (U. S.) 242; *Schroyer v. Lynch*, 8 *Watts (Pa.)* 453; *Richmond v. Long*, 17 *Grat. (Va.)* 375, 94 *Am. Dec.* 461.

⁴⁰⁷ *Ely v. Parsons*, 55 *Conn.* 83; *Conwell v. Voorhees*, 13 *Ohio*, 523, 42 *Am. Dec.* 206.

⁴⁰⁸ *Richmond v. Long*, 17 *Grat. (Va.)* 375, 94 *Am. Dec.* 461.

⁴⁰⁹ 1 *Am. Lead. Cas. (3d Ed.)* 621.

responsible for his own negligence or misfeasance only, and not for that of any of the others, although selected by him, and subject to his orders, unless he has been negligent or willful in appointing or retaining persons improper and unfit for such subordinate positions;⁴¹⁰ or unless they have been negligent in not requiring such subordinates to comply with certain prescribed rules or regulations;⁴¹¹ or in superintending them in the discharge of their official duties;⁴¹² or unless they have authorized or in some other way participated in the tort.⁴¹³ "This exemption is founded upon the general ground that he is a public officer, and that the whole establishment of the postoffice being for public purposes, and the officers employed therein being appointed under public authority, it would be against public policy to make the head of the department personally responsible for the acts of all his subordinate officers, since it would be impracticable for him to supervise all their acts, and discouragements thus would be held out against such employment in the public service."⁴¹⁴

(c) **Mail contractors.**—This rule has also been held to apply to contractors for carrying the public mail;⁴¹⁵ but it is

⁴¹⁰ *Lane v. Cotton*, 1 *Ld. Raym.* 646; *Whitfield v. Le Despencer*, *Cowp.* 754; *Dunlop v. Monroe*, 7 *Cranch (U. S.)* 242; *Maxwell v. McIlvoy*, 2 *Bibb (Ky.)* 211; *Bishop v. Williamson*, 11 *Me.* 495; *Keenan v. Southworth*, 110 *Mass.* 474, 14 *Am. Rep.* 613; *Hutchins v. Brackett*, 22 *N. H.* 252, 53 *Am. Dec.* 248; *Wiggins v. Hathaway*, 6 *Barb. (N. Y.)* 632; *Schroyer v. Lynch*, 8 *Watts (Pa.)* 453.

⁴¹¹ *Bishop v. Williamson*, 11 *Me.* 495; *Bolan v. Williamson*, 1 *Brev. (S. C.)* 181; *Sawyer v. Corse*, 17 *Grat. (Va.)* 230, 94 *Am. Dec.* 445.

⁴¹² *Dunlop v. Monroe*, 7 *Cranch (U. S.)* 242; *Ford v. Parker*, 4 *Ohio St.* 576.

⁴¹³ *Tracy v. Cloyd*, 10 *W. Va.* 19.

⁴¹⁴ *Story*, *Ag.* § 319.

⁴¹⁵ *Conwell v. Voorhees*, 13 *Ohio*, 523, 42 *Am. Dec.* 206, and *Hutchins v. Brackett*, 22 *N. H.* 252, 53 *Am. Dec.* 248, holding that mail contractors are not liable for money inclosed in a letter, handed to and lost by the mail carrier employed by them, and through his neglect. As was said in *Conwell v. Voorhees*, *supra*: "A mail carrier has no contract with those who transmit articles by public mail, he receives no fee or reward from them. His contract is with the government of the United States, for the performance of

believed to be the better rule that such a contractor is not a public agent within the meaning of the above rule, and that he is not exempted from liability for the wrongs of his subordinates.⁴¹⁶ As has been said: "Such a contractor is in no just and proper sense an officer of the government. And though he may be said to be in a certain sense an agent of the government because he is engaged in working for the government, yet the laborers and others whom he employs under him in the execution of his contract cannot be said to be agents of the government, which does not know them, does not appoint them, does not control them, does not pay them, and has nothing to do with them."⁴¹⁷ Mail carriers, like all others in the service of the mail contractor, are selected and employed by him, are paid by him, are under his direction and control, enter into contract with him alone, work for his benefit and profit, and may be discharged by him at pleasure. The fact that the law requires the carrier to be sworn before he enters on the discharge of his duties does not make him the agent of the government, or affect in any degree his relation to the contractor. The safety of the mail and the regularity of the service being dependent in a great degree upon the fidelity of the carrier, the law requires that he shall be sworn, as a guaranty to that extent of his fidelity, just as it is required for like reasons that he shall be not less than a certain age. But if he is an agent of the government, for whose acts the contractor is not responsible, why does the law trust him without security, while it exacts security from the contractor, and that, too, when the contractor is of necessity a man of substance, which the carrier seldom or never is? But if a carrier who has taken the oath required by

acts in execution of a public function. He is remunerated by the government. The duty he takes upon himself by the contract, he is sworn to perform. He acts for the general government, in the performance of a function, which the government is charged to have executed. So far, then, as the transmission of the mail is concerned, a mail contractor is a public agent, and, as such, only responsible."

⁴¹⁶ *Sawyer v. Corse*, 17 Grat. (Va.) 230, 94 Am. Dec. 445. And see *Collett v. London & N. W. R. Co.*, 16 Q. B. 984.

⁴¹⁷ *Sawyer v. Corse*, 17 Grat. (Va.) 230, 94 Am. Dec. 445.

the act of congress can be justly regarded as an agent of the government, and no longer the mere agent of the contractor, a carrier who has not taken the oath cannot be so regarded, because the act requires that he shall take the oath before he enters upon his duties.⁴¹⁸

(d) **Other public officers or agents.**—A public agent, within the meaning of the above rules, has been held to apply not only to public officers or agents of the government in the strict sense of the word, or in a strictly legal sense, but also to other public officers or agents acting in the public service and for public objects, whether they derive their authority directly from some public body of the government, or whether it is derived from general laws, or whether the objects of the agency are general or merely local.⁴¹⁹ As has been said: "It has been extended to the case of persons acting in the capacity of public agents engaged in the service of the public, and acting solely for the public benefit, though not strictly filling the character of officers or agents of the government."⁴²⁰ Thus these rules have been held to apply to a superintendent of school buildings or ward trustees;⁴²¹ a board of trustees, whose appointment is provided for by an act for the construction of a public bridge;⁴²² tax collectors;⁴²³ election officers;⁴²⁴ commissioners of highways;⁴²⁵ a county commissioner, for refusing to obey a mandamus to levy a tax to pay

⁴¹⁸ *Sawyer v. Corse*, 17 Grat. (Va.) 230, 94 Am. Dec. 445.

⁴¹⁹ *Hall v. Smith*, 2 Blng. 156; *Nicholson v. Mounsey*, 15 East, 384; *Holliday v. St. Leonard*, 11 C. B. (N. S.) 192; *Bailey v. City of New York*, 3 Hill (N. Y.) 531, 38 Am. Dec. 669; *Robertson v. Sichel*, 127 U. S. 507.

⁴²⁰ *Sawyer v. Corse*, 17 Grat. (Va.) 230, 94 Am. Dec. 445.

⁴²¹ *Donovan v. McAlpin*, 85 N. Y. 185; *Bassett v. Fish*, 12 Hun (N. Y.) 209.

⁴²² *Walsh v. New York & B. Bridge*, 96 N. Y. 427.

⁴²³ *Raynsford v. Phelps*, 43 Mich. 342, 38 Am. Rep. 189.

⁴²⁴ *Ashby v. White*, 1 Salk. 19; *Lincoln v. Hapgood*, 11 Mass. 350; *Jeffries v. Ankeny*, 11 Ohio, 372.

⁴²⁵ *Hover v. Barkhoof*, 44 N. Y. 113; *County Com'rs v. Duvall*, 54 Md. 350; *Hathaway v. Hinton*, 46 N. C. (1 Jones) 243.

a judgment against the county;⁴²⁶ inspectors of provisions, etc.⁴²⁷

§ 611. For torts of private agents.

But, of course, a public officer or agent is subject to the same liability as any other principal for torts committed by his private agent or servant while in the discharge of his official duties.⁴²⁸ The exemption, discussed above, refers only to torts committed by subordinates who act under him in an official capacity, in the discharge of some governmental or public function, and not to torts committed by an agent who acts for him as a private individual. The fact that he is a public officer or agent does not exempt him in such cases. Thus, where a postmaster permits one to handle the mails without having been sworn according to law, he is liable for such person's acts, as he is merely his private agent, and not an officer of the government.⁴²⁹

⁴²⁶ *St. Joseph F. & M. Ins. Co. v. Leland*, 90 Mo. 177, 59 Am. Rep. 9.

⁴²⁷ *Tardos v. Bozant*, 1 La. Ann. 199; *Hayes v. Porter*, 22 Me. 371; *Nickerson v. Thompson*, 33 Me. 433.

⁴²⁸ *Sawyer v. Corse*, 17 Grat. (Va.) 230, 94 Am. Dec. 445.

⁴²⁹ *Ely v. Parsons*, 55 Conn. 83; *Bishop v. Williamson*, 11 Me. 495; *Bolan v. Williamson*, 1 Brev. (S. C.) 181.

CHAPTER XVIII.

LIABILITIES OF THIRD PERSON TO AGENT.

§ 612. In general.

I. ON CONTRACTS.

§ 613. In general.

- 614. When agent may sue in his own name.
- 615. Right of agent to sue under code procedure.
- 616. Agent's right to sue does not pass to his assignees.
- 617. When agent cannot sue in his own name.
- 617½. Where agent may sue, but principal may control the suit.
- 618. Where agent has beneficial interest—Principal cannot control suit.
- 619. Where agent is in fact the principal.
- 620. On contracts under seal.
- 621. On quasi contracts—For money paid by mistake.
- 622. Agent cannot recover bribes offered him.
- 623. Defenses available to third person against agent.
- 624. Measure of damages.
- 625. Public agents.

II. IN TORT.

§ 626. For personal injuries.

- 627. For injuries to principal's property.

§ 612. In general.

Ordinarily the liabilities of a third person arising out of transactions with an agent, as such, run to the principal only, and his correlative rights are against such principal. But although this is the ordinary result of transactions with an agent, there are many cases in which the third person incurs liabilities to the agent also.

These liabilities of a third person to an agent may arise either out of contracts, into which he has entered with the agent on the principal's behalf, or they may arise out of torts which such person has committed against the agent in the course of his employment. In the following sections, then,

these liabilities will be considered, treating first of those liabilities to the agent arising out of contracts, and second of those arising out of torts.

I. ON CONTRACTS.

§ 613. In general.

As has been seen in preceding chapters, the primary purpose for which an agent is appointed is to bring his principal into contractual relations with third parties; and when this purpose is faithfully carried out it ordinarily results in binding obligations between the principal and such third person only. In such cases as the principal alone is bound, the reciprocal obligation on the part of the other contracting party would ordinarily be to him alone. But we have also seen that in many cases instead of the principal alone being bound, the agent also is bound, either solely or together with his principal, and either intentionally or unintentionally; and in such cases the agent alone may have reciprocal rights against the third person, or the principal also may have rights in the same case. It may be said, therefore, that it is only in exceptional cases that a third party is liable to an agent on contracts for his principal. In many cases the agent may be, either actually or apparently, the real party in interest in the contract, and as such may have a right to sue on the contract either exclusively or together with the principal. This right of the agent in any case of course depends upon the particular circumstances of that contract, the question to be determined being whether it was the intention of the parties that the other party's obligation should run to the agent and thus give him a right to enforce it.

§ 614. When agent may sue in his own name.

The cases in which an agent may sue in his own name have been classified as follows: "First: When the contract is in writing, and is expressly made with him, although he may have been known to act as agent. Secondly: When the agent is the only known or ostensible principal, and is, therefore, in contemplation of law, the real contracting party. Thirdly: When by the usage of trade, he is authorized to act

as owner, or as a principal contracting party, notwithstanding his well known position as agent only."¹

Where a contract is entered into with an agent personally, whether this is done expressly or through a failure to use apt words to make the principal a party to the contract, the obligation of the other contracting party runs to the agent, and in such case the agent may sue upon it in his own name,² notwithstanding it may have been known by the third party at the time of entering into the contract that he was acting as agent only, or that the principal was disclosed.³ Even

¹ *Rowe v. Rand*, 111 Ind. 206.

² *Sims v. Bond*, 5 Barn. & Adol. 389; *Joseph v. Knox*, 3 Camp. 320; *Leeds v. Marine Ins. Co.*, 6 Wheat. (U. S.) 565; *Albany & Rensselaer Co. v. Lundberg*, 121 U. S. 451; *Goodman v. Walker*, 30 Ala. 482, 68 Am. Dec. 134; *Bird v. Daniel*, 9 Ala. 302; *Tustin Fruit Ass'n v. Earl Fruit Co. (Cal.)* 53 Pac. 693; *Potter v. Yale College*, 8 Conn. 52; *Groover v. Warfield*, 50 Ga. 644; *Saladin v. Mitchell*, 45 Ill. 79; *Mills v. Jensen*, 75 Ill. App. 644; *Sharp v. Jones*, 18 Ind. 314, 81 Am. Dec. 359; *Tharp v. Farquar*, 6 B. Mon. (Ky.) 3; *Neff v. Baden*, 3 B. Mon. (Ky.) 468; *Willard v. Lugenbuhl*, 24 La. Ann. 18; *United States Tel. Co. v. Gildersleve*, 29 Md. 232, 96 Am. Dec. 519; *Colburn v. Phillips*, 13 Gray (Mass.) 64; *Borrowscale v. Bosworth*, 99 Mass. 378; *Pelton v. Baker*, 158 Mass. 349; *Doe v. Thompson*, 22 N. H. 217; *Ludwig v. Gillespie*, 105 N. Y. 653; *Alsop v. Caines*, 10 Johns. (N. Y.) 396; *Brown v. Morris*, 83 N. C. 254; *Potts v. Rider*, 3 Ohio, 71, 17 Am. Dec. 581; *Evrit v. Bancroft*, 22 Ohio St. 172; *Davis v. Harness*, 38 Ohio St. 397; *Du Bois v. Perkins*, 21 Or. 189; *Merrick's Estate*, 2 Ashm. (Pa.) 485; *Frazier v. Moore's Adm'r*, 11 Tex. 755; *Neal v. Andrews (Tex. Civ. App.)* 60 S. W. 459; *Culver v. Bigelow*, 43 Vt. 249; *Johnson v. Catlin*, 27 Vt. 87, 62 Am. Dec. 622; *Deitz v. Providence Wash. Ins. Co.*, 31 W. Va. 851, 18 Am. St. Rep. 909; *Murdock v. Franklin Ins. Co.*, 33 W. Va. 407.

³ *Orr v. Lacy*, 4 McLean, 243, Fed. Cas. No. 10,589; *Winters v. Rush*, 34 Cal. 186; *Tustin Fruit Ass'n v. Earl Fruit Co. (Cal.)* 53 Pac. 693; *Spence v. Wilson*, 102 Ga. 762; *Chadsey v. McCreery*, 27 Ill. 252; *McHenry v. Ridgely*, 3 Ill. 309, 35 Am. Dec. 110; *Shepherd v. Evans*, 9 Ind. 260; *Little v. O'Brien*, 9 Mass. 423; *Buffum v. Chadwick*, 8 Mass. 103; *Pelton v. Baker*, 158 Mass. 349; *Doe v. Thompson*, 22 N. H. 217; *Considerant v. Brisbane*, 22 N. Y. 389; *Poor v. Guilford*, 10 N. Y. 273, 61 Am. Dec. 749; *Cocke v. Dickens*, 4 Yerg. (Tenn.) 29, 26 Am. Dec. 214; *Barbee v. Williams*, 4 Heisk. (Tenn.) 522; *Johnson v. Catlin*, 27 Vt. 89, 62 Am. Dec. 622; *Murdock v. Franklin Ins. Co.*, 33 W. Va. 407.

where both the fact of the agency and the name of the principal are disclosed, these facts alone do not preclude the agent from suing on the contract. This right depends upon the intention of the parties as to whom the third person's obligation shall run; and although the fact of the agency and the name of the principal may appear, if it also appears that such obligation runs directly to the agent he may sue in his own name to enforce it.⁴ Nor is it necessary that the principal should assign to him the cause of action, if the contract is one for the fulfillment of which the agent is personally bound.⁵ The cases in which a contract is deemed to be made with an agent personally have been considered in a preceding chapter.⁶ If the agent sues in behalf of his alleged principal, proof of the agency is not necessary, if the principal adopts such act by prosecuting the same.⁷ Especially does this rule apply where both the fact of the agency and the name of the principal are concealed by the agent, at the time of entering into the contract, for it is a well established rule of law that where a contract not under seal is made with an agent in his own name, for an undisclosed principal, either the agent or the principal may sue upon it. In such a case the agent is in law the real party to whom the third party obligates himself and who therefore has the right to enforce such obligation.⁸ But where in such cases it is shown that the agent has no beneficial interest in the subject-matter, the declaration may be amended so as to show that the action is for the benefit of the principal, and to allow the action to proceed to judgment in that form.⁹

⁴ *Albany & Rensselaer Co. v. Lundberg*, 121 U. S. 451.

⁵ *Nelson v. Nixon*, 13 Abb. Pr. (N. Y.) 104.

⁶ See ante, chapter 11.

⁷ *Poppers v. Meager*, 33 Ill. App. 20.

⁸ *Sims v. Bond*, 5 Barn. & Adol. 389; *Carter v. Southern R. Co.*, 111 Ga. 38; *Saladin v. Mitchell*, 45 Ill. 79; *Stockbarger v. Sain*, 69 Ill. App. 436; *Baltimore Coal Tar & Mfg. Co. v. Fletcher*, 61 Md. 288; *Ludwig v. Gillespie*, 105 N. Y. 653; *Stewart v. Gregory*, 9 N. D. 618; *Neal v. Andrews* (Tex. Civ. App.) 60 S. W. 459; *Lapham v. Green*, 9 Vt. 407; *National Bank v. Nolting*, 94 Va. 263; *Coulter v. Blatchley*, 51 W. Va. 163; *Deitz v. Providence Wash. Ins. Co.*, 31 W. Va. 851, 13 Am. St. Rep. 909.

⁹ *National Bank of Va. v. Nolting*, 94 Va. 263.

Thus an agent may sue in his own name to enforce a contract where he carries on a business in his own name for his principal, and appears to be the proprietor, and sells goods in the trade as such apparent owner;¹⁰ or where he procures a policy of insurance in his own name for his principal's benefit,¹¹ but in such case, if the agent is without interest in the property insured, the beneficial interest of the principal must be averred and proved as the foundation of the right to recover;¹² or where a bill of lading is made out by him, in his own name, for goods which belonged to another, the bill stating that the goods are shipped by him (the agent);¹³ or where a negotiable instrument is indorsed in blank, and

¹⁰ *Gardiner v. Davis*, 2 Car. & P. 49; *United States Tel. Co. v. Gildersleve*, 29 Md. 232, 96 Am. Dec. 519; *Keown v. Vogel*, 25 Mo. App. 35; *Alsop v. Caines*, 10 Johns. (N. Y.) 396; *Du Bois v. Perkins*, 21 Or. 189. As was said in *Gardiner v. Davis*, 2 Car. & P. 49: "The person ostensibly carrying on the trade is by law entitled to recover for goods sold in the course of that trade unless the person so suffering him to carry on the trade interfere, by asserting his or her right to the sum due."

¹¹ *Hamburg-Bremen F. Ins. Co. v. Lewis*, 4 App. D. C. 66. Where a husband in making application for insurance on his wife's property informs the company's agent, authorized to procure such applications, that the property belongs to his wife, but the agent, contrary to his instructions, and without his knowledge, makes out the policy in his name instead of that of his wife, the policy will be binding upon the company, and the husband may sue upon it in his own name for the use of his wife. *Deitz v. Providence Wash. Ins. Co.*, 31 W. Va. 851, 13 Am. St. Rep. 909.

¹² *Hamburg-Bremen F. Ins. Co. v. Lewis*, 4 App. D. C. 66.

¹³ *Joseph v. Knox*, 3 Camp. 320 ("I am of opinion," says Lord Ellenborough in this case, "that this action well lies. There is a privity of contract established between these parties by means of the bill of lading. That states that the goods were shipped by the plaintiffs, and that the freight for them was paid by the plaintiffs in London. To the plaintiffs, therefore, from whom the consideration moves, and to whom the promise is made, the defendant is liable for the non-delivery of the goods"); *Hooper v. Chicago & N. W. R. Co.*, 27 Wis. 81, 9 Am. Rep. 439; *Southern Exp. Co. v. Craft*, 49 Miss. 480, 19 Am. Rep. 4; *Blanchard v. Page*, 8 Gray (Mass.) 281; *Finn v. Western R. Co.*, 112 Mass. 524, 17 Am. Rep. 128. Compare *Thompson v. Fargo*, 49 N. Y. 188, 10 Am. Rep. 342; *Krudler v. Ellison*, 47 N. Y. 36, 7 Am. Rep. 402.

delivered to him for collection,¹⁴ though it would be otherwise and the principal alone could sue, if the bill or note in such case was restrictively indorsed,¹⁵ or was delivered to the agent as a depositary merely, and not for collection.¹⁶ So, where one describes himself as agent, but covenants as in his own right, he may maintain an action against the covenantee who enters and enjoys the premises.¹⁷ So where the principal uses the agent's name as his own for business purposes, a contract so made in the agent's name may be sued upon by the latter in his own name.¹⁸ An agent of an undisclosed principal may maintain an action in his own name against a carrier for loss of property he has agreed to carry.¹⁹ So if an agent acts as trustee solely, he alone should bring an action on the contract, as the legal title is in him.²⁰ Where an agent rents property for the owner, and makes the contract in his own name, he may maintain an action on such contract, though the fact of the agency was known by the renter.²¹ But under a statute permitting money lost on a wager to be recovered back, and money so lost is contributed by several, but deposited in the name of one of them as agent for the others, the one so acting as agent could only recover the amount contributed by himself, and not that of the other contributors.²²

¹⁴ *Dugan v. United States*, 3 Wheat. (U. S.) 180; *Nisbet v. Lawson*, 1 Ga. 275; *Banks v. Eastin*, 3 Mart. (N. S.; La.) 291; *Sherwood v. Roys*, 14 Pick. (Mass.) 172; *Little v. O'Brien*, 9 Mass. 423; *Guernsey v. Burns*, 25 Wend. (N. Y.) 411; *Pearce v. Austin*, 4 Whart. (Pa.) 489, 34 Am. Dec. 523.

¹⁵ *Williams v. Shadbolt*, 1 Times Law R. 417.

¹⁶ *Sherwood v. Roys*, 14 Pick. (Mass.) 172.

¹⁷ *Potts v. Rider*, 3 Ohio, 70, 17 Am. Dec. 581.

¹⁸ *Alsop v. Caines*, 10 Johns. (N. Y.) 396; *United States Tel. Co. v. Gildersleve*, 29 Md. 232, 96 Am. Dec. 519.

¹⁹ *Elkins v. Boston & M. R. R.*, 19 N. H. 337, 51 Am. Dec. 184; *Carter v. Southern R. Co.*, 111 Ga. 38.

²⁰ *Upson v. Swezey*, 40 Conn. 472; *Sanford v. Nichols*, 14 Conn. 324; *Treat v. Stanton*, 14 Conn. 445; *Sherwood v. Roys*, 14 Pick. (Mass.) 172; *Porter v. Raymond*, 53 N. H. 519.

²¹ *Spence v. Wilson*, 102 Ga. 762.

²² *Ruckman v. Pitcher*, 20 N. Y. 9. And see *Donahoe v. McDonald*, 92 Ky. 123.

In order that an agent may maintain an action in his own name, however, he must do so while the agency exists. He cannot wait until after it has terminated and then sue.²³ Thus an agent depositing money of his principal in his own name as agent cannot maintain an action for it in his own name after his agency ceases.²⁴

— **Promissory note, bill, etc.** So where a promissory bill or note is made payable to an agent in person, or to an agent for his principal, or to an agent for the use of his principal, or to an agent as trustee, the promise is deemed to run to the agent and he may sue thereon in his own name.²⁵ So where the promise is made to a cashier, or to the president or other officer of a corporation, such cashier, president or other officer may sue thereon in his own name, though it is now generally held that the corporation is deemed to be the real payee and may also generally sue thereon in its own name.²⁶

²³ *Miller v. State Bank of Duluth*, 57 Minn. 319.

²⁴ *Miller v. State Bank of Duluth*, 57 Minn. 319.

²⁵ *Goodman v. Walker*, 30 Ala. 482, 68 Am. Dec. 134; *Bird v. Daniel*, 9 Ala. 302; *McConnel v. Thomas*, 3 Ill. 313; *Shepherd v. Evans*, 9 Ind. 260; *Stoll v. Sheldon*, 13 Neb. 207; *Clap v. Day*, 2 Me. 305, 11 Am. Dec. 99; *Pierce v. Robie*, 39 Me. 205, 63 Am. Dec. 614; *Whitcomb v. Smart*, 38 Me. 264; *Buffum v. Chadwick*, 8 Mass. 103; *Van Staphorst v. Pearce*, 4 Mass. 258; *Cocke v. Dickens*, 4 Yerg. (Tenn.) 29, 26 Am. Dec. 214.

²⁶ *Baldwin v. Bank of Newbury*, 1 Wall. (U. S.) 239; *Martin v. Lamb*, 77 Ga. 252; *Chadsey v. McCreery*, 27 Ill. 253; *McHenry v. Ridgely*, 3 Ill. 309, 35 Am. Dec. 110; *Hately v. Pike*, 162 Ill. 241, 53 Am. St. Rep. 304; *Erwin Lane Paper Co. v. Farmers' Nat. Bank*, 130 Ind. 367, 30 Am. St. Rep. 246; *Nave v. First Nat. Bank*, 87 Ind. 204; *Nave v. Hadley*, 74 Ind. 155; *Pratt v. Topeka Bank*, 12 Kan. 570; *Barney v. Newcomb*, 9 Cush. (Mass.) 46; *Fairfield v. Adams*, 16 Pick. (Mass.) 381; *Commercial Bank v. French*, 21 Pick. (Mass.) 486, 32 Am. Dec. 280; *Garton v. Union City Nat. Bank*, 34 Mich. 279; *Horah v. Long*, 20 N. C. (4 Dev. & B.) 416, 34 Am. Dec. 378; *Rose v. Laffan*, 2 Speer (S. C.) 424, 42 Am. Dec. 376; *Johnson v. Catlin*, 27 Vt. 87, 62 Am. Dec. 622; *Rutland & B. R. Co. v. Cole*, 24 Vt. 38; *Binney v. Plumley*, 5 Vt. 500, 26 Am. Dec. 313. A cashier may maintain an action in his own name against the acceptor of a bill of exchange, where the bill is drawn payable to "M. Johnson, Cashier," the promise being made to the cashier as an individual, and the addition being simply descriptive of the person. *Johnson v. Catlin*, 27 Vt. 87, 62 Am. Dec. 622. Where a note is made to an

But where the promise is made to the agent, treasurer or other officer of a named principal, the name of such agent or officer not being given, the promise is generally deemed to run to the principal alone and suit thereon should be brought in his name.²⁷ So the agent may sue upon any other contract in which a promise is made to him, as a bill of lading,²⁸ a bill of exchange,²⁹ a covenant under seal,³⁰ or an insurance contract.³¹ The agent's right to sue in his own name, where the instrument is in terms payable to him, is the same whether it be a promissory note, bill of exchange, check, bill of lading, policy of insurance, bond, and like instances.³²

§ 615. Right of agent to sue under code procedure.

This right of an agent to sue in his own name on a contract entered into in his own name for or on behalf of his principal is not affected by the code provisions, in some states, where code procedure prevails, that every action must be prosecuted in the name of "the real party in interest," as such provisions give a right to "the trustee of an express trust," and then define such a trustee as "a person with whom, or in whose name, a contract is made for the benefit of another," and thus include an agent in this definition and give him a right of action in his own name, without joining the party beneficially

agent or treasurer of a private association, by name, with the addition of his agency or office, he may sue upon it in his own name. *Clap v. Day*, 2 Me. 305, 11 Am. Dec. 99.

²⁷ *Pigott v. Thompson*, 3 Bos. & P. 147; *Alston v. Heartman*, 2 Ala. 699; *Ewing v. Medlock*, 5 Port. (Ala.) 82; *Crawford v. Dean*, 6 Blackf. (Ind.) 181; *Commercial Bank v. French*, 21 Pick. (Mass.) 486, 32 Am. Dec. 280; *Vermont Cent. R. Co. v. Claves*, 21 Vt. 31.

²⁸ *Sargent v. Morris*, 3 Barn. & Ald. 277; *Blanchard v. Page*, 8 Gray (Mass.) 281; *Griffith v. Ingledew*, 6 Serg. & R. (Pa.) 429, 9 Am. Dec. 444.

²⁹ *Dugan v. United States*, 3 Wheat. (U. S.) 172.

³⁰ *Neff v. Baden*, 3 B. Mon. (Ky.) 468.

³¹ *Provincial Ins. Co. v. Leduc*, L. R. 6 P. C. 224; *Finney v. Bedford Commercial Ins. Co.*, 8 Metc. (Mass.) 348, 41 Am. Dec. 515; *Murdock v. Franklin Ins. Co.*, 33 W. Va. 407; *Deitz v. Providence Wash. Ins. Co.*, 31 W. Va. 851, 13 Am. St. Rep. 909.

³² *Deitz v. Providence Wash. Ins. Co.*, 31 W. Va. 851, 13 Am. St. Rep. 909; 1 Wait, Act. & Def. 279.

interested, notwithstanding such provision.³³ But to enable an agent to sue in his own name, in such cases, there must be something more than the mere naked powers of an agent.³⁴ If there is nothing more than such power the action generally should be in the principal's name only. The above rule applies to rights of action at law in the federal courts, held within the state where there is such a statutory provision, notwithstanding any rule of the federal court to the contrary.³⁵

This provision of the statutes, giving a right of action to a "trustee of an express trust" was merely designed to preserve a right of action which existed by the modern common law of England under such circumstances.³⁶ Thus

³³ For a construction of these provisions in the various states, see *West v. Crawford*, 80 Cal. 19; *Winters v. Rush*, 34 Cal. 136; *Landwerlen v. Wheeler*, 106 Ind. 523; *Sharp v. Jones*, 18 Ind. 314, 81 Am. Dec. 359; *Beard v. Sloan*, 38 Ind. 128; *Holmes v. Boyd*, 90 Ind. 332; *Cottle v. Cole*, 20 Iowa, 482; *Rice v. Savery*, 22 Iowa, 470; *Scantlin v. Allison*, 12 Kan. 85; *Close v. Hodges*, 44 Minn. 204; *Cremer v. Wimmer*, 40 Minn. 511; *Snider v. Adams Exp. Co.*, 77 Mo. 523; *Wolfe v. Mo. Pac. R. Co.*, 97 Mo. 473, 10 Am. St. Rep. 331; *Considerant v. Brisbane*, 22 N. Y. 389; *Brown v. Cherry*, 56 Barb. (N. Y.) 635; *Societa Italiana v. Sulzer*, 138 N. Y. 468; *Marine Ins. Co. v. Walsh-Upstill Coal Co.*, 23 Ohio Circ. R. 191; *Hudson v. Archer*, 4 S. D. 128. And see *Ward v. Ryba*, 58 Kan. 741.

As was said in *Sharp v. Jones*, 18 Ind. 314, 81 Am. Dec. 359, construing 2 Rev. St. 27: "Under this section, if an agent, for example, a carrier of goods, a factor, consignor, or consignee, etc., makes a contract oral or written in his own name, touching the subject of his agency, he can sue upon it."

³⁴ *Barkley v. Wolfskehl*, 25 Misc. (N. Y.) 420; *Bell v. Tilden*, 16 Hun (N. Y.) 346; *Hays v. Hathorn*, 74 N. Y. 486.

³⁵ U. S. Rev. St. § 914; *Albany & Rensselaer Co. v. Lundberg*, 121 U. S. 451; *Weed Sewing Mach. Co. v. Wicks*, 3 Dill. 261, Fed. Cas. No. 17,348.

³⁶ *Wolfe v. Mo. Pac. R. Co.*, 97 Mo. 473, 10 Am. St. Rep. 331, citing *Short v. Spackman*, 2 Barn. & Adol. 962; *Drinkwater v. Goodwin*, Cowp. 251.

As was said by Wright, J., in *Considerant v. Brisbane*, 22 N. Y. 394, in which case an agent sued on a note payable to him as agent of a corporation: "Prior to the Code, therefore, I am of the opinion that the plaintiff might have maintained an action on the express contracts set out in the complaint for the benefit of his

this provision of the code has been held to give a right of action to an agent of a foreign corporation to whom notes are made payable "as executive agent of the company";³⁷ to a mercantile agent doing business for others in his own name;³⁸ to a general agent of an incorporated association;³⁹ to an agent of the equitable owner of a chattel who takes a chattel

principals, having a legal interest in them by way of trust. The promise being to him in writing for the benefit of another, he would have been deemed the party 'with whom, or in whose name,' the contracts were made, and in whose name alone the promise could be enforced in a court of law. The Code, however, abrogated the common law rule, that the right of action followed the legal title, and made the beneficial interest the sole test of the right. In adopting the latter rule, it was easily to be seen that there was a class of cases in which it would be extremely prejudicial to the remedy, as well as difficult of application, viz., the case of executors, persons authorized by statute to sue, and trustees of an express trust. To obviate this, it was specially provided that, in these cases, the executor, or statutory party, or trustee of an express trust, might sue without joining with him the person for whose benefit the action was prosecuted. (Code, § 113.) The term, 'trustee of an express trust,' had, however, acquired a technical and statutory meaning. Express trusts, at least up to the adoption of the Revised Statutes, were defined to be trusts created by the direct and positive acts of the parties by some writing, or deed, or will; and the Revised Statutes had abolished all express trusts, except as therein enumerated, which related to land. If the 113th section of the Code was to be confined and limited to those enumerated as express trusts, the practical inconvenience arising from making the beneficial interest the sole test of the right to sue, and which that section was intended to obviate, would continue to exist in a large class of formal and informal trusts. Accordingly, in 1851, the section was amended by adding the provision that 'a trustee of an express trust, within the meaning of the section, shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another.' It is to be observed that there is no attempt to define the meaning of the term 'trustee of an express trust,' in its general sense; but the statutory declaration is, that those words 'shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another.'"

³⁷ *Considerant v. Brisbane*, 22 N. Y. 389.

³⁸ *Ludwig v. Gillespie*, 51 N. Y. Super. Ct. 310, 105 N. Y. 653.

³⁹ *Habicht v. Pemberton*, 4 Sandf. (N. Y.) 657; *Myers v. Machado*, 6 Abb. Pr. (N. Y.) 198.

mortgage and note in his own name to secure the debt;⁴⁰ to an agent who has authority of several owners to collect a claim in his own name;⁴¹ or to an auctioneer, who, in his own name, sells goods for a third person, and he may sue upon the contract of sale, without an assignment to him of the cause of action.⁴² Where a note secured by a mortgage is purchased by a bank, and endorsed to its cashier, he is trustee of an express trust, and may sue to foreclose in his own name.⁴³ So an agent who has contracted with a carrier to deliver goods consigned to him at a particular place, and who has no pecuniary interest in them except his lien for commissions, is a trustee of an express trust under section 3463 of the Revised Statutes of Missouri, 1879, and may maintain an action in his own name for their wrongful delivery.⁴⁴ But where the secretary of a corporation, without authority, delivered notes to another without indorsement or consideration, the latter was not the real party in interest nor was he a trustee of an express trust so as to enable him to maintain an action on the notes in his own name.⁴⁵

Under such provisions, the meaning of the term, "trustee of an express trust," is not left to the interpretation and construction of the courts, but usually its signification and construction are so plainly and clearly defined by the legislature as to leave no room for doubt or construction. Any person is a "trustee of an express trust" with whom or in whose name, a contract is made for the benefit of another, and the word "contract" is not used in a limited or restricted sense, but is used and is intended to be applied to all and any kinds of contracts.⁴⁶ "It is intended, manifestly, to embrace not only formal trusts, declared by deed inter partes, but all cases in which a person, acting in behalf of a third party, enters into a written express contract with another; either in his individual name, without description, or in his own

⁴⁰ *Close v. Hodges*, 44 Minn. 204.

⁴¹ *Noe v. Christie*, 51 N. Y. 270.

⁴² *Bogart v. O'Regan*, 1 E. D. Smith (N. Y.) 590.

⁴³ *Holmes v. Boyd*, 90 Ind. 332.

⁴⁴ *Wolfe v. Mo. Pac. R. Co.*, 97 Mo. 473, 10 Am. St. Rep. 331.

⁴⁵ *Barkley v. Wolfskehl*, 25 Misc. (N. Y.) 420.

⁴⁶ *Heavenridge v. Mondy*, 34 Ind. 28.

name, expressly in trust for, or on behalf of, or for the benefit of, another, by whatever form of expression such trust may be declared. It includes not only a person with whom, but one in whose name, a contract is made for the benefit of another."⁴⁷

§ 616. Agent's right to sue does not pass to his assignees.

This right of an agent, to sue upon a contract in his own name, does not pass to his assignees in bankruptcy, unless he has a beneficial interest in the avails of the suit.⁴⁸ Assignees in bankruptcy do not, like heirs and executors, take the whole legal title in the bankrupt's property. They take such estate only as the bankrupt had a beneficial as well as legal interest in, and which is to be applied for the payment of his debts. Thus, to a plea that the plaintiff is a bankrupt, and that all his estate vested in his assignees, it is a good replication that the whole beneficial interest in the contract or demand in suit was vested by prior assignment in a third party, for whose benefit the suit is prosecuted.⁴⁹

§ 617. When agent cannot sue in his own name.

As has been seen, the primary purpose of an agency is to bring about contractual relations between the principal and a third person, and where an agent has faithfully carried out his agency, the principal alone will generally have rights and incur liabilities under the contract. Where, then, an agent has no beneficial interest in the transaction and is not made a party to the contract, it is a general rule that a contract entered into by an agent, as such, in the name of or on behalf of a disclosed principal may be sued upon by the latter only, and the agent has no right of action against the

⁴⁷ *Considerant v. Brisbane*, 22 N. Y. 389.

⁴⁸ *Rhoades v. Blackiston*, 106 Mass. 334, 8 Am. Rep. 332; *Webster v. Scales*, 4 Doug. 7; *Carpenter v. Marnell*, 3 Bos. & P. 40; *Winch v. Keeley*, 1 Term R. 619. A negotiable instrument payable to R. G., "agent of his assignees, or order," cannot be sued upon at law in the name of the persons who were assignees of R. G. by a deed executed before the date of the negotiable security, without his indorsement. *Grist v. Backhouse*, 20 N. C. (4 Dev. & B.) 496.

⁴⁹ *Rhoades v. Blackiston*, 106 Mass. 334, 8 Am. Rep. 332.

third party upon such contract,⁵⁰ unless the principal authorizes the agent to sue on his behalf.⁵¹ Ordinarily, if the agent has performed his duty in good faith, as soon as he has brought about a contract between his principal and a third person, his duty is then fully performed and all rights and liabilities arising out of such contract are between the principal and third person only, the agent in reference to such being treated as if he did not exist; thereafter the principal is the only one who can enforce rights arising out of the contract, and is the only one who is subject to liabilities thereon in favor of the other contracting party.

Unless the obligation runs expressly to the agent, or unless there is a clear implication that it was the intention that the obligation should run to him, the action should be brought in the name of the principal.⁵² Thus, where an agent, pursuant to the instructions of his principal, delivers to a common carrier moneys of the principal consigned to and to be transported to him, the agent, from the time of the delivery, ceases to have any title or interest therein and cannot maintain an action against the carrier therefor; and it is immaterial whether the moneys so delivered were the identical moneys of the principal, or whether other moneys were substituted by the agent; and the fact that the moneys were the fruits of a fraud perpetrated by the principal through the instrumentality of the agent, although the latter was innocent of the fraud, gives him no title to the moneys which will au-

⁵⁰ *Fisher v. Marsh*, 6 Best & S. 411; *Thatcher v. Winslow*, 5 Mason, 58, Fed. Cas. No. 13,863; *Lineker v. Ayeshford*, 1 Cal. 76; *Garland v. Reynolds*, 20 Me. 45; *Barlow v. Congregational Soc.*, 8 Allen (Mass.) 460; *Commercial Bank v. French*, 21 Pick. (Mass.) 486, 32 Am. Dec. 280; *Gunn v. Cantine*, 10 Johns. (N. Y.) 387; *Buckbee v. Brown*, 21 Wend. (N. Y.) 110; *Bayley v. Onondaga County Mut. Ins. Co.*, 6 Hill (N. Y.) 476, 41 Am. Dec. 759. An agent, to whom a negotiable note has been indorsed by his principal for the benefit of the latter, and who has no interest in the note, cannot sue as indorsee upon the note. *Thatcher v. Winslow*, 5 Mason, 58, Fed. Cas. No. 13,863.

⁵¹ *Bragg v. Greenleaf*, 14 Me. 395; *Bradford v. Bucknam*, 12 Me. 15.

⁵² *Tharp v. Farquar*, 6 B. Mon. (Ky.) 3.

thorize him to maintain the action.⁵³ So a wharfinger or dock master cannot maintain an action in his own name for the recovery of money due for dockage or wharfage, from the owner of a vessel frequenting the port of which he is wharfinger, although by the ordinances and statutes under which he acts, the dockage and wharfage are directed to be paid to him, and he is required to collect the same. The remedies in such case must be pursued in the name of the party in interest, and not in the name of the agent who made the contract or whose duty it is to make collection of moneys accruing under such contract.⁵⁴ So where an agent having a general power of attorney to collect debts, etc., in the name and for the use of his principal, delivers a contract to an attorney to collect, who gives him a receipt for it, generally, as for collection, the agent cannot maintain an action in his own name, against the attorney, for the money collected by him on the contracts so put into his hands.⁵⁵ So where an agent sues upon a contract, wherein he appears as agent, and under which money is payable to his principal, he cannot recover without proving that he was doing business under the name of his principal, or that his principal assigned the contract to him.⁵⁶

§ 617½. Where agent may sue, but principal may control the suit.

Although an agent may, in many instances, sue in his own name upon contracts made by him, this does not always give him an unlimited right as to the management or control of the action. Except in certain cases, as where the agent has a beneficial interest or the contract is made with him expressly, the agent's right to sue is a subordinate one subject to the direction and control of the principal. Where a contract, instead of being binding on the agent alone or on the principal alone, is so executed that it is binding on them both, the primary right of suing on such contract is in the principal, though the agent, with the express or implied con-

⁵³ *Thompson v. Fargo*, 63 N. Y. 479.

⁵⁴ *Buckbee v. Brown*, 21 Wend. (N. Y.) 110.

⁵⁵ *Gunn v. Cantine*, 10 Johns. (N. Y.) 387.

⁵⁶ *Bullock v. Ueberroth*, 121 Mich. 298.

sent of his principal, may sue thereon in his own name.⁵⁷ And this rule applies whether the principal was disclosed or undisclosed. As the contract is in fact made for the principal, he may sue to enforce it and this right of the principal ordinarily is superior to that of the agent. Although the agent has a right to sue upon such contracts in his own name, as the principal is the real party in interest, his right to do so is subject to the right of the principal to come in and bring the action in his own name, and thereby exclude the agent from suing in his own name.⁵⁸

This rule, however, has an exception, as shall be seen in the following section, and that is where the agent has a lien upon, or some special property or interest in the subject-matter of the contract. In such cases the principal's right to sue and control the action is not superior to the agent's right to sue, at least not to the extent of such lien or interest.⁵⁹ As has been said: "It is a well-established rule of law that when a contract, not under seal, is made with an agent in his own name for an undisclosed principal, either the agent or the principal may sue upon it. If the agent sues, it is no ground of defense that the beneficial interest is in another, or that the plaintiff, when he recovers, will be bound to account to another. * * * The agent's right is, of course, subordinate to and liable to the control of the principal, to the extent of his interest. He may supersede it by suing in his own name, or otherwise suspend or extinguish it, subject only to the special right or lien which the agent may have acquired."⁶⁰

§ 618. Where agent has beneficial interest—Principal cannot control suit.

Where, however, an agent has a beneficial interest in the

⁵⁷ *Sadler v. Leigh*, 4 Camp. 195; *Rowe v. Rand*, 111 Ind. 206; *Rhoades v. Blackiston*, 106 Mass. 334, 8 Am. Rep. 332.

⁵⁸ *Morris v. Cleasby*, 1 Maule & S. 579; *Walter v. Ross*, 2 Wash. C. 283, Fed. Cas. No. 17,122; *Borrowdale v. Bosworth*, 99 Mass. 378; *Kelley v. Munson*, 7 Mass. 319; *Winchester v. Howard*, 97 Mass. 303, 93 Am. Dec. 93; *Ludwig v. Gillespie*, 105 N. Y. 653; *Schaefer v. Henkel*, 75 N. Y. 378; *Considerant v. Brisbane*, 22 N. Y. 389; *Girard v. Taggart*, 5 Serg. & R. (Pa.) 19, 9 Am. Dec. 327.

⁵⁹ See post, § 618.

⁶⁰ *Rhoades v. Blackiston*, 106 Mass. 334, 8 Am. Rep. 332.

contract or a special property or interest in the subject-matter of the contract, as where he has a lien for commissions or some other vested right, he may sue thereon in his own name; and such suit is not subject to the control of the principal, at least not to the extent of such special property or interest.⁶¹ If he has a lien upon the subject-matter, as against his principal, his right to sue on the contract is superior to that of his principal until such lien is satisfied.⁶² But in order that this rule may apply, the agent must have some special property or interest in the contract or its subject-matter,⁶³ and a mere interest in commissions yet to be earned is not sufficient.⁶⁴ An interest sufficient to support this rule on the part of the agent will be presumed in cases where the agent is one who usually has such an interest, as in the case of an auctioneer selling personal property;⁶⁵ a

⁶¹ Chitty, Pl. 8; *Atkins v. Amber*, 2 Esp. 493; *Drinkwater v. Goodwin*, Cowp. 251; *Tankersley v. Graham*, 8 Ala. 247; *Beller v. Block*, 19 Ark. 566; *Treat v. Stanton*, 14 Conn. 445; *Rowe v. Rand*, 111 Ind. 206; *Graham v. Duckwall*, 8 Bush (Ky.) 12; *Curry v. Curry*, 87 Ky. 667, 12 Am. St. Rep. 504; *Thompson v. Kelly*, 101 Mass. 291, 3 Am. Rep. 353; *Colburn v. Phillips*, 13 Gray (Mass.) 64; *Porter v. Raymond*, 53 N. H. 519; *Barnes v. Union M. F. Ins. Co.*, 45 N. H. 21; *Underhill v. Gibson*, 2 N. H. 352, 9 Am. Dec. 82; *Toland v. Murray*, 18 Johns. (N. Y.) 24; *Whitehead v. Potter*, 26 N. C. (4 Ired.) 257; *Evrit v. Bancroft*, 22 Ohio St. 172; *Baltimore & P. Steamboat Co. v. Atkins*, 22 Pa. 522; *Girard v. Taggart*, 5 Serg. & R. (Pa.) 27, 9 Am. Dec. 327.

⁶² *Drinkwater v. Goodwin*, Cowp. 251.

⁶³ *United States Tel. Co. v. Gildersleve*, 29 Md. 232, 96 Am. Dec. 519.

⁶⁴ *Fairlie v. Fenton*, L. R. 5 Exch. 169; *Tinsley v. Dowell*, 87 Tex. 23.

⁶⁵ *Coppin v. Craig*, 2 Marsh. 501; *Grice v. Kenrick*, L. R. 5 Q. B. 340; *Beller v. Block*, 19 Ark. 566; *Thompson v. Kelly*, 101 Mass. 291, 3 Am. Rep. 353; *Minturn v. Main*, 7 N. Y. 220; *Hulse v. Young*, 16 Johns. (N. Y.) 1; *Bogart v. O'Regan*, 1 E. D. Smith (N. Y.) 590. "This doctrine stands upon the right of the auctioneer to receive, and his responsibility to his principal for, the price of the property sold, and his lien thereon for commissions; which give him a special property in the goods intrusted to him for sale, and an interest in the proceeds. In case of real estate, he can have no such special property and would not ordinarily be entitled to receive the price. But when the terms of his employment and of the

factor;⁶⁶ a policy broker having his name on the policy;⁶⁷ the captain of a freight ship;⁶⁸ or a warehouseman or carrier.⁶⁹

It is only where a person acts as a mere agent that a special beneficial interest must be proved to maintain an action or may be disproved to defeat it.⁷⁰ Thus where an agent sells goods under a *del credere* commission, he has such an interest therein as will entitle him to sue for the price of the goods sold by him, though his right is subject to the superior rights of his principal, not incompatible with his own.⁷¹ Where a collector of customs puts certain property seized by him into the hands of a third person and takes a promise for its delivery on demand to the marshal of the district, or to the deputy of such marshal, the collector has such an interest in the property that he may sue on the contract in his own name.⁷² A factor, selling goods for another,

authorized sale, contemplate the payment of a deposit into his hands at the time of the auction, and before the completion of the sale by the delivery of the deed, he stands, in relation to such deposit, in the same position as he does to the price of personal property sold and delivered by him. He may receive and receipt for the deposit; his lien for commissions will attach to it; and we see no reason why he may not sue for it in his own name, whenever an action for the deposit, separate from the other purchase money, may become necessary." By Wells, J., in *Thompson v. Kelly*, 101 Mass. 291, 3 Am. Rep. 353. To entitle an auctioneer, who has made a sale for another, in his own name, to recover against the purchaser, it is not necessary to show that he is regularly licensed, nor that he has complied with the provisions of the statutes relating to auctioneers. *Bogart v. O'Regan*, 1 E. D. Smith (N. Y.) 590.

⁶⁶ *Sadler v. Leigh*, 4 Camp. 195; *Morris v. Cleasby*, 1 Maule & S. 581; *Grover v. Warfield*, 50 Ga. 644; *United States Tel. Co. v. Gildersleve*, 29 Md. 232, 96 Am. Dec. 519.

⁶⁷ *Hagedorn v. Oliverson*, 2 Maule & S. 485; *Mellish v. Bell*, 15 East, 4; *Rider v. Ocean Ins. Co.*, 20 Pick. (Mass.) 259; *Ward v. Wood*, 13 Mass. 539; *Lazarus v. Com. Ins. Co.*, 5 Pick. (Mass.) 76.

⁶⁸ *Brown v. Hodgson*, 4 Taunt. 189; *Shields v. Davis*, 6 Taunt. 65.

⁶⁹ *Martini v. Coles*, 1 Maule & S. 147.

⁷⁰ *Minturn v. Main*, 7 N. Y. 220.

⁷¹ See Story, Ag. § 398.

⁷² *Sally v. Cleveland*, 10 Wend. (N. Y.) 156.

has such an interest therein that he may sue for the purchase price;⁷³ but this rule does not ordinarily apply to a broker, as such, unless he contracts personally or unless he does in fact have a special property or interest in the subject-matter under the circumstances of the particular case.⁷⁴ Nor does an agent, authorized to sell land on commission, and who makes such sale, have such an interest as will give him the right to sue for a breach of the contract of sale.⁷⁵ But where an agent employed to sell land takes from the purchaser the note of another, indorsed by the purchaser, and pays the amount thereof to his principal, he acquires such an interest in the note as will entitle him to sue upon it.⁷⁶

§ 619. Where agent is in fact the principal.

As to whether or not a person who has contracted with a third person as agent for another can show himself to be the real principal and as such sue upon the contract is not so easily determined. There are a number of circumstances to be considered in determining this right of an agent. The fact whether the contract is an executed or an executory one will have a material bearing on this question, as will also the fact whether he has contracted for a named or for an unnamed principal. In determining this question one must always keep in mind the well known principle that every man is entitled to the credit and character of the person with whom he deals, and that he has a right to determine who this person shall be. Upon this principle the determination of this question largely depends, although in many cases it will be found that the fact that he has given credit to the one or the other is implied from the circumstances of the particular case.⁷⁷ In order to better discuss this ques-

⁷³ *Johnson v. Hudson*, 11 East, 180; *Graham v. Duckwall*, 8 Bush (Ky.) 12.

⁷⁴ *Fairlie v. Fenton*, L. R. 5 Exch. 169; *White v. Chouteau*, 10 Barb. (N. Y.) 202.

⁷⁵ *Tinsley v. Dowell*, 87 Tex. 23.

⁷⁶ *Tankersley v. Graham*, 8 Ala. 247.

⁷⁷ *Humble v. Hunter*, 12 Q. B. 310; *Arkansas Valley Smelting Co. v. Belden Min. Co.*, 127 U. S. 387; *Winchester v. Howard*, 97 Mass. 303, 93 Am. Dec. 93; *Lansden v. McCarthy*, 45 Mo. 106.

tion the various states of facts, under which it may arise will be classified as follows: a. Where the contract is executory, for (1) a named, or (2) an unnamed principal. b. Where the contract is executed, for (1) a named, or (2) an unnamed principal.

(a) **Where the contract is executory.** 1. **For a named principal.**—Where the contract into which the agent has entered for a named principal is wholly unperformed, or is partly performed without knowledge by the third party of who the real principal is, it seems clear that the agent cannot come in and show himself to be the real principal, and as such sue upon the contract without the express or implied consent of the other contracting party, for in such case the latter has dealt upon the faith and credit of the named principal, and he cannot be compelled to accept the credit of another.⁷⁸ This rule especially applies in cases of contracts in which the skill or solvency of the person who is named as the principal may reasonably be considered as a material ingredient in the contract. It is clear that the agent cannot then show himself to be the real principal, and sue in his own name without the other's consent.⁷⁹ In all such cases the third person has a right to choose to whom he will delegate the performance of acts requiring skill or other personal qualifications, and, if he has chosen such person, he has a right to performance by him, and cannot be compelled to accept performance from any other without his consent.⁸⁰ "It may be of importance to him who performs the contract, as when he contracts with another to paint a picture, or write a book, or furnish articles of a particular kind, or when he relies upon the character or qualities of an individual, or has * * * reasons why he does not wish to deal with a particular party."⁸¹

Where the third party has accepted part performance by an agent of a contract made for a named principal with

⁷⁸ *Rayner v. Grote*, 15 Mees. & W. 359; *Schmaltz v. Avery*, 16 Q. B. 655.

⁷⁹ *Rayner v. Grote*, 15 Mees. & W. 359.

⁸⁰ *Boulton v. Jones*, 2 Hurl. & N. 564; *Schmalting v. Tomlinson*, 6 Taunt. 147; *Boston Ice Co. v. Potter*, 123 Mass. 28, 25 Am. Rep. 9.

⁸¹ *Boston Ice Co. v. Potter*, 123 Mass. 28, 25 Am. Rep. 9.

knowledge that the agent is the real principal, he may be held liable for not accepting performance of the residue by the agent.⁸² Thus, where the plaintiff made a written contract for the sale of goods, in which he described himself as the agent of A, and the buyer accepted and paid the price of a portion of the goods, with notice that the plaintiff was himself the real principal in the transaction, the plaintiff could sue in his own name for the nonacceptance and nonpayment for the residue of the goods.⁸³

2. For an unnamed principal.—Where, however, the contract is entered into for an unknown or unnamed principal, and it is still executory, it is clear that the third person cannot be held to have contracted on the credit of such principal, whom he did not know. It is not reasonable to suppose that he contracted on the faith and credit of one whose name he did not know and of whom he knew nothing. As he must be liable to some one in such case, it is no harder on him to be liable to the agent than to another, and as he must be deemed to have contracted upon the credit of some one, that one must have been the agent, who is the only other known party to the contract. Hence it is the rule in such cases that the agent may show himself to be the real principal and as such may compel performance of the contract by the other party.⁸⁴ It may be that the third person would have refused to enter into the contract, had he known that the agent was the principal, and he may have relied on the terms of the contract indicating that he was acting as agent only, being willing to accept of anyone else, be he who he might, as principal, yet as he does not know the unnamed principal, he is not prejudiced by being held liable to the agent as principal. Thus where an agent carrying on a business under the name of Schmaltz & Co. executed a charter party between the defendant "and G. Schmaltz & Co. (agents of the freighter)," and at the end of the charter party was a memorandum: "This charter being concluded on behalf of another party,

⁸² *Rayner v. Grote*, 15 Mees. & W. 359; *Whiting v. Crawford*, 93 Md. 390.

⁸³ *Rayner v. Grote*, 15 Mees. & W. 359.

⁸⁴ *Schmaltz v. Avery*, 16 Q. B. 655.

it is agreed that all responsibility on the part of G. Schmaltz & Co. shall cease as soon as the cargo is shipped," it was held that the agent could compel the defendant to perform his part of the contract.⁸⁵ It has been held, however, that if the contract is one within the statute of frauds, and is made for an unnamed principal and the third party did not know that the agent was in fact the principal, the writing in such form is not such a memorandum, within the meaning of the statute, as will enable the agent to sue thereon in his own name.⁸⁶

⁸⁵ *Schmaltz v. Avery*, 16 Q. B. 655. As was said in this case: "The names of the supposed freighters not being inserted, no inducement to enter into the contract from the supposed solvency of the freighters can be surmised. Any one who could prove himself to have been the real freighter and principal, whether solvent or not, might most unquestionably have sued on this charter party. The defendant cannot have been in any way prejudiced in respect to any supposed reliance on the solvency of the freighter, since the freighter is admitted to have been unknown to him, and he did not think it necessary to inquire who he was. It is indeed possible that he may have been contented to take any freighter and principal provided it was not the present plaintiff, and may have relied on the terms of the charter party indicating that the plaintiff was an agent only, being willing to accept of any one else, be he who he might, as principal. After all, therefore, the question is reduced to this: Whether we are to assume that the defendant did so rely on the character of the plaintiff as agent only, and would not have contracted with him as principal if he had known him so to be, and are to lay it down as a broad rule that a person contracting as agent for an unknown and unnamed principal is precluded from saying, I am myself that principal. Doubtless his saying so does in some measure contradict the written contract; * * * yet the defendant does not appear to be prejudiced; for, as he was regardless who the real freighter was, it should seem that he trusted for his freight to his lien on the cargo. But there is no contradiction of the charter party if the plaintiff can be considered as filling two characters, namely those of agent and principal. A man cannot in strict propriety of speech be said to be agent to himself. Yet, in a contract of this description, we see no absurdity in saying that he might fill both characters; that he might contract as agent for the freighter, whoever that freighter might turn out to be, and might still adopt that character of freighter himself if he chose."

⁸⁶ *Sharman v. Brandt*, L. R. 6 Q. B. 720. But see *Hunter v. Giddings*, 97 Mass. 41, 93 Am. Dec. 54.

(b) **Where the contract is executed.** 1. **For a named principal.**—Where an agent enters into a contract for a named principal and the contract has been performed by himself as principal, whether or not the agent may show himself to be the principal and sue thereon as such depends upon the fact whether the third party knew that he was in fact the principal, or expressly or impliedly consents to performance of the contract by him. If the contract is one that involves personal qualifications or considerations on the part of the supposed principal, and the contract has been performed by the agent as principal with the consent, express or implied, of the other contracting party, the agent may sue to enforce performance to himself on the part of the third party; though it would be otherwise if such performance by the agent was without the third party's express or implied consent.⁸⁷ A person who has exhibited himself as agent for another whom he names, cannot at once throw off that character and put himself forward as principal without any communication or notice to the other party.⁸⁸

And this rule would also seem to apply to contracts which do not involve personal qualifications or considerations, if the other party has notice of the true state of facts before suit is brought by the agent, or if he expressly or impliedly consents to performance by the agent of his part of the contract.⁸⁹ As has been said: "When a party has entered into a contract under the assumed character of an agent, either concealing or falsely representing the name of the principal, when in fact he was himself the principal, and party for whose benefit he had, under the assumed character of agent, made the contract, it has been holden he cannot maintain an action upon such contract as principal without having first given to the other party notice of his real character, upon the ground that the plaintiff had misled the defendant by assuming a situation

⁸⁷ *Bickerton v. Burrell*, 5 Maule & S. 383; *Schmaltz v. Avery*, 16 Q. B. 655; *Rayner v. Grote*, 15 Mees. & W. 359; *Boston Ice Co. v. Potter*, 123 Mass. 28, 25 Am. Rep. 9; *Orcutt v. Nelson*, 1 Gray (Mass.) 536; *Eggleston v. Boardman*, 37 Mich. 14.

⁸⁸ *Bickerton v. Burrell*, 5 Maule & S. 383.

⁸⁹ *Bickerton v. Burrell*, 5 Maule & S. 383; *Foster v. Smith*, 2 Cold. (Tenn.) 475, 88 Am. Dec. 604.

which did not belong to him, and therefore was bound to undeceive the defendant before bringing the action.”⁹⁰ Of course, it would be otherwise if he had no knowledge of such facts, and does not expressly or impliedly consent thereto.

2. For an unnamed principal.—But where the contract is entered into for an unnamed principal and it has been executed by the agent himself as principal; he may show himself to be the principal and as such sue the other contracting party to enforce performance of his part of the contract; whether the contract is one involving personal qualifications or considerations, or not.⁹¹ It cannot be said that he has contracted on the faith and credit of a principal whom he did not know, and as he must be liable to some one, in such cases, it must be to the agent, who is in fact the principal, and who is the real party in interest. And as the contract has been fully executed on the assumed agent’s part, and the other contracting party has received the benefit of the contract, he is in no wise prejudiced that he is compelled on his part to render performance to the agent, as principal. If it were a case in which the principal was known, he might be prejudiced by the fact that he had some offset or other defense against such principal; but as in these cases he does not know who the principal is, he cannot show that he is prejudiced by being held liable to the agent.

§ 620. On contracts under seal.

It is a well established common-law principle that only such persons may sue upon a sealed instrument as are made parties thereto, and that parol evidence is not admissible to show that a person not mentioned therein is a party to the contract. Where therefore an agent enters into a contract in his own name and sealed with his seal, the contract is his alone, and he alone can sue upon it; and in such case the principal has no right to bring an action thereon in his own name although he was disclosed at the time the contract was executed, but was not made a party thereto.⁹² If, however,

⁹⁰ *Foster v. Smith*, 2 Cold. (Tenn.) 475, 38 Am. Dec. 604.

⁹¹ *Schmaltz v. Avery*, 16 Q. B. 655.

⁹² *Schack v. Anthony*, 1 Maule & S. 573; *Berkeley v. Hardy*, 5 Barn. & C. 355; *Clarke’s Lessee v. Courtney*, 5 Pet. (U. S.) 319;

the instrument is one that is not required to be under seal, and a seal has been attached thereto, it may be regarded as surplusage, and the instrument treated as a simple contract, in which case the principal may sue thereon if he is the real party in interest. In such cases the same rules apply as to other simple contracts.⁹³ But in order to take a case out of the general rule, where the contract is one which is valid without a seal, and the seal is therefore of no account, it must appear from the instrument that the contract was really made on behalf of the principal and that the principal derived benefit from and accepted and confirmed it by acts on his part.⁹⁴

§ 621. On quasi contracts—For money paid by mistake.

Where an agent has paid out money belonging to his principal to a third person under a mistake of fact, or under any circumstances that render such person liable to repay the same, although the principal himself may sue to recover the money,⁹⁵ the agent also has that right, and may sue in his own name to recover such money.⁹⁶ And the same is true where the agent pays the money upon a contract which is illegal, but of which fact he was ignorant at the time he paid out the money.⁹⁷ As the agent may be held personally liable to the principal for the money so paid out, this right

Spencer v. Field, 10 Wend. (N. Y.) 88; *Schaefer v. Henkel*, 75 N. Y. 378; *Briggs v. Partridge*, 64 N. Y. 357, 21 Am. Rep. 617; *Hopkins v. Mehaffy*, 11 Serg. & R. (Pa.) 129; *Cocke v. Dickens*, 4 Yerg. (Tenn.) 29, 26 Am. Dec. 214.

⁹³ *Lancaster v. Knickerbocker Ice Co.*, 153 Pa. 427.

⁹⁴ *Schaefer v. Henkel*, 75 N. Y. 378.

⁹⁵ *Stevenson v. Mortimer*, Cowp. 805.

⁹⁶ *Stevenson v. Mortimer*, Cowp. 805; *Colonial Bank v. Exchange Bank*, 11 App. Cas. 84; *Holt v. Ely*, 1 El. & Bl. 795.

⁹⁷ An insurance having been made on goods, at and from a port in Russia to London, by an agent residing in England for a Russian subject abroad, which insurance was in fact made after the commencement of hostilities by Russia against England, but before the knowledge of it there, and after the ship had sailed, and been seized and confiscated, the policy was void in its inception, but the agent of the assured was entitled to a return of the premium paid under ignorance of the fact of such hostilities. *Oom v. Bruce*, 12 East, 225.

of action against the third person is the only remedy by which he can protect himself in such cases.⁹⁸ Where an agent, in unauthorizedly exchanging his principal's money with a third person, receives in exchange a counterfeit bill, he may maintain an action in his own name to recover back the money paid out by him for it.⁹⁹

Where, however, the third person has been guilty of no fault or fraud, and the mistake is one that is committed by the agent alone, the agent cannot recover therefor. Thus, where an agent sells property of his principal to another, but through carelessness or by a mistake sells for less than he should have sold for, and there is no fault on the part of the purchaser, the agent cannot recover from the purchaser the difference between the price paid and the price for which he should have sold, although he may have accounted to his principal for the full price.¹⁰⁰ So, where an agent in making a settlement with another, on behalf of his principal, erroneously included therein certain matters which he was not authorized to include, he cannot, in the absence of fraud on the part of the other party, repudiate the settlement on the ground that his instructions did not authorize him to do that which he voluntarily did, and recover money which he claims to have paid by mistake.¹⁰¹

§ 622. Agent cannot recover bribes offered him.

But an agent cannot sue a third person to recover money or property promised to him by way of a bribe, whether such promise had any effect upon his discharge of his duties, or not.¹⁰²

§ 623. Defenses available to third person against agent.

Where an agent sues the third person in his own name, such person may set up any defense, in law or equity, which he may have against the agent, as the plaintiff in the suit;¹⁰³

⁹⁸ Kent v. Bornstein, 12 Allen (Mass.) 342.

⁹⁹ Kent v. Bornstein, 12 Allen (Mass.) 342.

¹⁰⁰ Hungerford v. Scott, 37 Wis. 341.

¹⁰¹ Yetter v. Van Patten, 103 Ill. App. 59.

¹⁰² Harrington v. Victoria Graving Dock Co., 3 Q. B. Div. 549.

¹⁰³ Gibson v. Winter, 5 Barn. & Adol. 96; Leeds v. Marine Ins. Co.,

or which he may have against the principal, if there is one in existence, in whose interest the suit is brought,¹⁰⁴ unless the contract was made upon the exclusive credit of the agent, in which case the third party could not set up any defense which he might have against the principal. Thus it has been held that the defendant may set off against the agent's claim a debt due to him from the principal.¹⁰⁵ So a settlement with the principal is a good defense to the agent's claim,¹⁰⁶ unless the agent has such a special property or interest in the subject-matter as gives him a superior right to sue, and such a settlement would be prejudicial to his claim,¹⁰⁷ though if the defendant was led to believe and did in fact believe, from the agent's conduct or from the terms of the contract, that he acquiesced in such settlement, it could be set up as a defense to his claim, notwithstanding it might be to his prejudice.¹⁰⁸ So the defendant is entitled to discovery to the same extent as if the principal had brought the suit, and may have a stay of proceedings, until such discovery.¹⁰⁹

§ 624. Measure of damages.

The measure of damages in an action by the agent upon the contract, if the principal does not interfere and himself sue, is the full damages to the same extent as if the action had been brought by the principal in his own name.¹¹⁰

6 Wheat. (U. S.) 565; Bliss v. Sneath, 103 Cal. 43; Holden v. Rutland R. Co., 73 Vt. 317.

¹⁰⁴ Smith v. Lyon, 3 Camp. 465; Atkinson v. Cotesworth, 3 Barn. & C. 647; Leeds v. Marine Ins. Co., 6 Wheat. (U. S.) 565; Bliss v. Sneath, 103 Cal. 43; Hayden v. Alton Nat. Bank, 29 Ill. App. 463; Huntington v. Knox, 7 Cush. (Mass.) 371; Holden v. Rutland R. Co., 73 Vt. 317.

¹⁰⁵ Bliss v. Sneath, 103 Cal. 43; Hayden v. Alton Nat. Bank, 29 Ill. App. 458. Compare Isberg v. Bowden, 8 Exch. 852; Alsop v. Caines, 10 Johns. (N. Y.) 396.

¹⁰⁶ Atkinson v. Cotesworth, 3 Barn. & C. 647; Solomon v. Nicholas, 113 Ill. 351.

¹⁰⁷ Robinson v. Rutter, 4 El. & Bl. 954.

¹⁰⁸ Grice v. Kenrick, L. R. 5 Q. B. 340; Atkyns v. Amber, 2 Esp. 493.

¹⁰⁹ Willis v. Baddeley [1892] 2 Q. B. 324.

¹¹⁰ Joseph v. Knox, 3 Camp. 320; Gardiner v. Davis, 2 Car. & P.

Where, however, the principal interferes in the suit, if the agent is allowed to sue at all, he can recover only to the extent of the special property or interest he may have in the contract or subject-matter.¹¹¹

The extent of a third person's liability to an agent upon a contract must of course depend upon the terms of the particular contract alone. It cannot be affected by outside circumstances not pertaining to the contract relation between the agent and the other contracting party. Thus it cannot be affected either in the way of diminishing or enlarging such liability, by an agreement between the principal and agent, or by any other circumstances that pertain only to the mutual rights and duties between the principal and his agent.¹¹²

§ 625. Public agents.

As has been seen heretofore, a public agent ordinarily is not personally liable upon a contract which he enters into for or on behalf of the government.¹¹³ If, therefore, he is not liable upon such contracts, he ordinarily cannot sue thereon. Thus, where a bill of exchange is indorsed to the treasurer of the United States, suit thereon should be brought in the name of the United States, and not of the treasurer.¹¹⁴ So, where a naval officer shipped seamen for the public service on board a public ship and took a contract from a surety for their rendering themselves on board at the proper time, such officer could not sue on such contract.¹¹⁵ Of course if a public agent enters into a contract personally, and binds himself personally on a contract on behalf of the government, he will have a right to sue on such contract, just as under such circumstances he may be held personally liable thereon.¹¹⁶

49; *Groover v. Warfield*, 50 Ga. 644; *United States Tel. Co. v. Gildersleve*, 29 Md. 232, 96 Am. Dec. 519; *Evril v. Bancroft*, 22 Ohio St. 172.

¹¹¹ See *Mechem*, Ag. 616.

¹¹² *Evril v. Bancroft*, 22 Ohio St. 172.

¹¹³ See ante, §§ 576, 589.

¹¹⁴ *Dugan v. United States*, 3 Wheat. (U. S.) 172.

¹¹⁵ *Bainbridge v. Downie*, 6 Mass. 253.

¹¹⁶ See ante, §§ 576, 589.

II. IN TORT.

§ 626. For personal injuries.

(a) **In general.**—A third person is liable to an agent for all personal injuries or trespasses committed against the latter while he is acting in the course of his employment, and for such injuries the agent may maintain an action in his own name, whether the injury is caused by fraud, deceit, misrepresentation, or any other tortious act. A third person's liability to the principal for such injuries has been considered in a preceding chapter.¹¹⁷ Thus, where an agent is engaged in selling goods on commission, and a third person publishes a libel in reference to the subject-matter of his agency, by reason of which the agent loses some of his customers, he may maintain an action against such person to recover the damages thereby sustained.¹¹⁸ It would be otherwise, however, if the agent was working upon a salary, for in such case the natural loss would be to the principal; though even in such case it would seem that the agent could sue, if the salary was measured by, or in some way based upon, the amount of the agent's sales.

(b) **Procuring discharge.**—So an agent may sue a third person to recover damages sustained by reason of such person maliciously, unlawfully, and unjustifiably inducing his principal to discharge him, although the agent is not employed for a fixed period and the principal has the right to discharge him at any time.¹¹⁹ Though a principal may have the legal right to terminate the agency at any time, and in doing so

¹¹⁷ See ante, § 555.

¹¹⁸ *Weiss v. Whittemore*, 28 Mich. 366.

¹¹⁹ *Bowen v. Hall*, 6 Q. B. Div. 333; *Chipley v. Atkinson*, 23 Fla. 206, 11 Am. St. Rep. 367; *Perkins v. Pendleton*, 90 Me. 166, 60 Am. St. Rep. 252; *Moran v. Dunphy*, 177 Mass. 485, 83 Am. St. Rep. 289; *Curran v. Galen*, 152 N. Y. 33, 57 Am. St. Rep. 496. The reasoning upon which this doctrine seems to be based is set forth in substance in *Bowen v. Hall*, 6 Q. B. Div. 333, as follows: "Wherever a man does an act which in law and in fact is a wrongful act, and such an act as may, as a natural and probable consequence of it, produce injury to another, and which in the particular case does produce such an injury, an action on the case will lie; that if these conditions are satisfied, the action does not the less lie because the natural and probable consequence of the act complained of is an act done by

violates no right of the agent, yet so long as the principal is willing and ready to continue his contract, it is not a legal right, but is a wrong on the part of a third party to maliciously and wantonly procure the principal to terminate the agency.¹²⁰ An unsuccessful but malicious attempt to procure the discharge of an agent by a third person will not support an action against him for damages; an actual discharge is necessary to support such action.¹²¹ If the agent leaves his principal's service voluntarily, owing to the unsuccessful, but malicious, attempts of such third person to have him discharged, he cannot recover from such person.¹²² It is also necessary, in order that the agent may maintain such an action, that injury has resulted to him as the natural and probable consequence of the third person's unlawful acts in procuring his discharge.¹²³

If, however, the third person does nothing unlawful but acts wholly within his legal rights in procuring the agent's discharge, the latter has no right of action against him, though

a third person, or because such act so done by a third person is a breach of duty or contract by him, or an act illegal on his part, or an act otherwise imposing an actionable liability on him; that though it has been said the law implies that the act of the third party, being one which he has free will and power to do or not to do, is his own willful act, and therefore is not the natural or probable result of the defendant's act, and though this may be so in many cases, yet if the law were so to imply in every case, it would be an implication contrary to manifest truth and fact; that though it has been said that if the act of the third person is a breach of duty or contract, or is an act which it is illegal for him to do, the law will not recognize that it is a natural or probable consequence of the defendant's act; yet if this were so held in all cases, the law would in some instances, refuse to recognize what manifestly is true in fact; * * * that merely to persuade a person to break his contract may not be wrongful in law or fact, still, if the persuasion be used for the indirect purpose of injuring the plaintiff or benefiting the defendant at the expense of the plaintiff, it is a malicious act which in law and in fact is a wrongful act, and therefore an objectionable injury if injury issues from it."

¹²⁰ *Chipley v. Atkinson*, 23 Fla. 206, 11 Am. St. Rep. 367; *Moran v. Dunphy*, 177 Mass. 485, 83 Am. St. Rep. 289.

¹²¹ *Chipley v. Atkinson*, 23 Fla. 206, 11 Am. St. Rep. 367.

¹²² *Chipley v. Atkinson*, 23 Fla. 206, 11 Am. St. Rep. 367.

¹²³ *Chipley v. Atkinson*, 23 Fla. 206, 11 Am. St. Rep. 367.

such person acted with a malicious motive.¹²⁴ The fact that a third person withholds a gratuity from or breaks his contract with the principal, because the latter retains the agent in his service or with an interest in his business, does not amount to a procurement of the agent's discharge and does not give the latter a right of action against the third person.¹²⁵ But such facts may be used as proof to show the malicious attempt of the third person to persuade the principal to discharge him.¹²⁶

(c) **Same—Damages.**—In determining damages in such cases, speculative profits or probable damages resulting to the agent from a proposed partnership with the principal is entirely too uncertain to be estimated as an element of actual or compensatory damages sustained by the agent. Where, however, the third party knew or believed, or had reason to believe, that the principal had promised or did actually intend to admit the agent into partnership, the fact of such knowledge or belief may be considered by the jury in passing upon the motive of the third party and in fixing exemplary damages.¹²⁷

§ 627. For injuries to principal's property.

Ordinarily the right to sue for injuries to the principal's property would be in the principal, as he is the one who has suffered a loss by reason of such injuries. But where an agent has the immediate possession, or right to the immediate possession, of his principal's property in the course of his agency, and has a special or general interest or property therein, he may maintain an action in his own name against anyone who unlawfully converts or injures such property;¹²⁸

¹²⁴ *Chipley v. Atkinson*, 23 Fla. 206, 11 Am. St. Rep. 367; *Raycroft v. Tayntor*, 68 Vt. 219, 54 Am. St. Rep. 882.

¹²⁵ *Chipley v. Atkinson*, 23 Fla. 206, 11 Am. St. Rep. 367. A threat by a third person, in the exercise of a lawful right to break his contract with a principal if the latter does not discharge his agent, not engaged for any definite time, does not give the agent a right of action for damages against the party making the threat, although his motive in procuring the discharge may have been inspired by malice. *Raycroft v. Tayntor*, 68 Vt. 219, 54 Am. St. Rep. 882.

¹²⁶ *Chipley v. Atkinson*, 23 Fla. 206, 11 Am. St. Rep. 367.

¹²⁷ *Chipley v. Atkinson*, 23 Fla. 206, 11 Am. St. Rep. 367.

¹²⁸ *Williams v. Millington*, 1 H. Bl. 81; *Burton v. Hughes*, 2 Bing.

but to enable an agent to maintain an action of trover by virtue of a special property in the thing taken, he must have an absolute vested interest in it.¹²⁹ And this rule is true even against the true owner of such property to the extent that the agent has a special property or interest therein.¹³⁰ Suit for the conversion of goods in the possession of an agent may be brought either by him alone or jointly with his principal.¹³¹ In an action of trover, by an agent, against a third person, the latter cannot show title in a third person, either to defeat the action or in mitigation of damages, without showing some claim, title, or interest in himself derived from such person.¹³²

Thus, where the plaintiff entered into an agreement with the D. & H. Canal Company whereby he agreed to take charge of and navigate a boat during the season, and he was to reserve \$8 on each trip towards payment of the boat, and when he had reserved \$225 he was to have title to the boat, and under this contract he had reserved \$136 towards such purchase, he had such an interest in the boat as would enable him to maintain an action of trover against a tax collector who levied upon and sold the boat as the property of the D. & H. Canal Company.¹³³ But one suing in his own name for the burning of grass upon land of which he has possession only as agent cannot recover, where it does not appear that he had in himself any right to the grass.¹³⁴ So agents, who have made advances for prior charges on goods consigned to them to be transported and delivered to the ultimate consignees or owners, have such an interest in the goods as entitles them to maintain an action to recover the

173; *Beyer v. Bush*, 50 Ala. 19; *Robinson v. Webb*, 11 Bush (Ky.) 464; *Little v. Fossett*, 34 Me. 545, 56 Am. Dec. 671; *Harker v. Dement*, 9 Gill (Md.) 7, 52 Am. Dec. 670; *Laing v. Nelson*, 41 Minn. 521; *Tuthill v. Wheeler*, 6 Barb. (N. Y.) 362; *Triplett v. Morris*, 18 Tex. Civ. App. 50; *Taylor v. Hayes*, 63 Vt. 475.

¹²⁹ *Tuthill v. Wheeler*, 6 Barb. (N. Y.) 362.

¹³⁰ *White v. Webb*, 15 Conn. 302; *Little v. Fossett*, 34 Me. 545, 56 Am. Dec. 671.

¹³¹ *Triplett v. Morris*, 18 Tex. Civ. App. 50.

¹³² *Harker v. Dement*, 9 Gill (Md.) 7, 52 Am. Dec. 670; *Duncan v. Spear*, 11 Wend. (N. Y.) 54.

¹³³ *Tuthill v. Wheeler*, 6 Barb. (N. Y.) 362.

¹³⁴ *Galveston, H. & S. A. R. Co. v. Stockton*, 15 Tex. Civ. App. 145.

possession thereof against a third person to whom they have been wrongfully delivered by the carrier.¹³⁵

— **Measure of damages.** The measure of damages as against a third person where an agent sues for injuries to the principal's property, is the full measure of damages to the property, to the full value of the property, if it has been converted and he had possession, or right to the immediate possession, of the property.¹³⁶ But as against his principal, or one claiming under him, he can recover only to the extent of his special interest or property in the goods.¹³⁷ Where he recovers the full measure of damages against a third person, he holds them in his own right to the extent of his interest in the property, and the balance in trust for the owner.¹³⁸ In a suit by an agent for the conversion of goods which he had received in settlement of the claims of several creditors, he can only recover an amount proportionate to the amount due such creditors as he was actually authorized to represent.¹³⁹

¹³⁵ *Fitzhugh v. Wiman*, 9 N. Y. 559. An agent buying bonds in his own name for another may maintain an action in his own name for the recovery of the possession of them. *Douglas v. Wolf*, 6 Kan. 88. See *Ward v. Ryba*, 58 Kan. 741, holding that an agent who takes in his own name a bill of sale of personal property in payment of a debt due to his principal, and who upon taking possession of the property for his principal is dispossessed of it by third parties, cannot maintain replevin in his own name for its repossession under a general allegation of ownership in himself, without stating the facts in relation to his special interest and right of possession.

¹³⁶ *Treadwell v. Davis*, 34 Cal. 601, 94 Am. Dec. 770; *Schley v. Lyon*, 6 Ga. 530; *Little v. Fossett*, 34 Me. 545, 56 Am. Dec. 671; *Harker v. Dement*, 9 Gill (Md.) 7, 52 Am. Dec. 670; *Finn v. Western R. Co.*, 112 Mass. 524, 17 Am. Rep. 128; *Pomeroy v. Smith*, 17 Pick. (Mass.) 85; *Cullen v. O'Hara*, 4 Mich. 132; *Mechanics' & Traders' Bank v. Farmers' & Mechanics' Nat. Bank*, 60 N. Y. 40; *Lyle v. Barker*, 5 Bin. (Pa.) 457.

¹³⁷ *Roberts v. Wyatt*, 2 Taunt. 268; *Treadwell v. Davis*, 34 Cal. 601, 94 Am. Dec. 770; *White v. Webb*, 15 Conn. 305; *Schley v. Lyon*, 6 Ga. 530; *Little v. Fossett*, 34 Me. 545, 56 Am. Dec. 671; *Burk v. Webb*, 32 Mich. 173; *Davidson v. Gunsolly*, 1 Mich. 388; *Ingersoll v. Van Bokkellin*, 7 Cow. (N. Y.) 670.

¹³⁸ *White v. Webb*, 15 Conn. 305; *Lyle v. Barker*, 5 Bin. (Pa.) 457.

¹³⁹ *Triplett v. Morris*, 18 Tex. Civ. App. 50.

C. & S.—86.

BOOK IV.

SPECIAL CLASSES OF AGENTS.

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§ 628. Scope of chapter.

It is impossible in a work of this nature to enter into an extensive examination and treatment of the subject of attorneys at law. To treat of their relations to the state or to the courts would be foreign to the scope of this work. Therefore, throughout this chapter, it will be the author's purpose to consider them as private agents, and to treat only of so much of their relation to their clients or their client's business as comes within the subject of agency. For this purpose it will be assumed that the reader is familiar with the definition of an attorney; of the rules as to who may be

attorneys; of the rules governing their admission to practice; of their relation to the state or to the court; and that they have been properly admitted and licensed to practice. So that the scope of this chapter will be to give some of the general rules of agency that govern an attorney's relation to his client or his client's business.

I. THE RELATION.

§ 629. Nature.

The relation existing between an attorney and his client is that of principal and agent, and generally is governed by the same rules as those applicable to other agencies. In the treatment of the subject of agency we have seen many of the applications of the rules of agency to the relation of attorney and client, but this subject is one of such importance and has so many special features, different from other agencies, that it is deemed best to give to it a more extensive consideration, in reference to the application of the rules of agency. Although it may be stated generally that all the rules applicable to the relation of principal and agent also apply to the relation of attorney and client, yet there are some special features in the latter relation that make necessary a qualification of some of the general rules of agency. It will be seen hereafter, that although an attorney is in fact the agent of his client, yet his powers are in many respects much broader than those of an ordinary agent. An ordinary agent must pursue his authority according to the instructions of his principal, but we will see hereafter that there are some acts within an attorney's powers that even the client cannot control, save by taking away the attorney's authority entirely. An attorney is more than a mere agent. "He is also an officer of the court, and within his sphere and in the line of his special powers he is as independent as the judge of the court, and has not only his duties and obligations to the court and to his client, but he has rights and powers entirely different from and superior to an ordinary agent. An agent receives his orders from and is directed absolutely and wholly by his principal, in the management of his business. On the other hand, the business of the client which is submitted to his attorney is managed entirely by the attorney, and the client is advised and directed by him. As

to the business committed to his care, the attorney is the sole manager and director. Hence his responsibilities are much greater than those of an ordinary agent. His reputation and his abilities are at stake to some extent in every case he undertakes."¹

§ 630. Formation.

(a) **In general.**—The relation of attorney and client exists only from the time the attorney has been employed by the client; or in other words, only from the time a contract of employment, or retainer, has been consummated. As far as the court is concerned, the license granted to an attorney by the court is all that is necessary. But in order that he may represent his client in legal proceedings of any kind, whether in the prosecution of a suit, the collection of a claim, the preparation of an abstract of title, or any other legal cause, he must have authority from his client to do so. As he is the client's agent, and acts only by his will, he cannot act for him, if the client has never so willed. Therefore, before the relation of attorney and client can exist, there must always be a contract, express or implied, by which the attorney is retained to act for the client in some legal transaction,² as advice in a matter or the prosecution of a suit or other legal proceeding.

(b) **Retainer.**—This employment of an attorney is called a retainer, though the word "retainer" is also often used to denote the fee that is paid to an attorney to bind his employment. But a retainer, properly speaking, is the act of the client in employing his attorney, which prevents the latter from acting for the client's adversary.³ It has been held

¹ *Curtis v. Richards* (Idaho) 40 Pac. 57.

² *Osborn v. United States Bank*, 9 Wheat. (U. S.) 829; *Milligan v. Ala. Fertilizer Co.*, 89 Ala. 322; *Perkins v. West Coast Lumber Co.*, 129 Cal. 427; *Hefferman v. Burt*, 7 Iowa, 320, 71 Am. Dec. 445; *McAlexander v. Wright*, 3 T. B. Mon. (Ky.) 189, 16 Am. Dec. 93; *Wheeler v. Harrison*, 94 Md. 147; *Ryan v. Long*, 35 Minn. 394; *McCreary v. Hoopes*, 25 Miss. 428; *Allen v. Stone*, 10 Barb. (N. Y.) 547; *Roy v. Harley*, 1 Duer (N. Y.) 637; *Hoover v. Greenbaum*, 61 N. Y. 305; *Ex parte Lynch*, 25 S. C. 200; *Marrow v. Brinkley*, 85 Va. 55.

³ *Union Surety & G. Co. v. Tenney*, 200 Ill. 349.

that it requires a retainer or fee paid to constitute the relation of attorney and client;⁴ but though the payment of a fee is the most usual and weighty item of evidence to establish the relationship, it is by no means indispensable. The essential feature of the professional relation is the fact of employment to do something in the client's behalf. There must be an agreement, express or implied, for compensation, but whether payment is made in part or in whole by retainer in advance is immaterial. Nor is it even indispensable that the compensation should be assumed by the client. Ordinarily, it is so from the nature of the employment which in the majority of cases involves the guarding or enforcement of the client's interests against adverse ones, and is therefore exclusive. But even adverse interests, if to be amicably adjusted, may be represented by the same counsel, though the cases in which this can be done are exceptional and never entirely free from danger of conflicting duties.⁵

Thus an attorney, as between himself and his client, has no power to appear and act for the client by virtue of his license alone. He must be employed by the party for whom he appears, or by some one authorized to represent such party.⁶ So the mere fact that one has acted as solicitor for another, in all matters connected with a trust does not authorize him to enter an appearance for him as defendant.⁷ But where an attorney is employed in anticipation of a suit to be brought, his authority does not commence only from the institution of the suit, but there are many acts that he may perform before as well as after the suit has commenced.⁸

(c) **Necessity for warrant of attorney.**—It was formerly required, that in order for an attorney to appear for his client, he should be authorized by a formal warrant of attorney in open court,⁹ but although this law may have been a good one to restrain attorneys from improper prac-

⁴ *De Wolf v. Strader*, 26 Ill. 225, 79 Am. Dec. 371.

⁵ *Lawall v. Groman*, 180 Pa. 532, 57 Am. St. Rep. 662.

⁶ *McAlexander v. Wright*, 3 T. B. Mon. (Ky.) 189, 16 Am. Dec. 93.

⁷ *In re Gray*, 65 Law T. (N. S.) 743.

⁸ *Hefferman v. Burt*, 7 Iowa, 320, 71 Am. Dec. 445; *Dentzel v. City & Suburban R. Co.*, 90 Md. 434.

⁹ *McAlexander v. Wright*, 3 T. B. Mon. (Ky.) 189, 16 Am. Dec. 93.

tices,—such as appearing in a case without authority, making use of securities that come into their hands, for fraudulent purposes, etc.,—yet it has long since fallen into disuse, and the fact that the adjudged cases are silent on the subject is good testimony in favor of the integrity of the profession, and an indication that such warrants are no longer necessary.¹⁰ Afterwards a writing en pais, or even a parol authority, became sufficient, the usual practice now being merely a verbal request or retainer by the client, unless there is a statute or rule of court requiring otherwise.¹¹ And it is even not necessary that his retainer should be by parol, or otherwise expressly made, but may be implied from the acts of the parties, or other circumstances.¹² All that

¹⁰ *Arnold v. Borough of Poole*, 5 Scott N. R. 741; *Osborn v. United States Bank*, 9 Wheat. (U. S.) 739; *Leslie v. Fischer*, 62 Ill. 118; *Penobscot Boom Corp. v. Lamson*, 16 Me. 224, 33 Am. Dec. 656; *Henck v. Todhunter*, 7 Har. & J. (Md.) 275, 16 Am. Dec. 300; *Farmers' & Mechanics' Bank v. Troy City Bank*, 1 Doug. (Mich.) 457; *Hardin v. Ho-yo-po-nubby's Lessee*, 27 Miss. 567; *Bunton v. Lyford*, 37 N. H. 512, 75 Am. Dec. 144; *Bowlsby v. Johnson*, 13 N. J. Law, 350; *Campbell v. Galbreath*, 5 Watts (Pa.) 423; *Boutlier v. Johnson*, 2 Browne (Pa.) 17; *Allen v. Green*, 1 Bailey (S. C.) 448; *Hellman v. McWhennle*, 3 Rich. Law (S. C.) 364. "The ancient common law," says Dillon, J., in *Harshey v. Blackmarr*, 20 Iowa, 161, 89 Am. Dec. 520, "required the parties to be present and prosecute or defend in person. It required a patent or special authority from the crown to enable parties to appear by attorney. Afterwards, by various statutes, the right to appear by attorney was recognized. But a party might still sue or defend in person, and the right to prosecute or defend by attorney was a mere privilege, intended for the convenience or benefit of suitors." See, also, 3 Bl. Comm. 25; *Thompson v. Blackhurst*, 1 Nev. & M. 271; *Latuch v. Pasherante*, 1 Salk. 86; *Anon.*, 6 Mod. 16; *Lorymer v. Hollister*, 2 Strange, 693; *Holbert v. Montgomery*, 5 Dana (Ky.) 11; *McCullough v. Guetner*, 1 Bin. (Pa.) 214; *Reinholdt v. Alverti*, 1 Bin. (Pa.) 469.

¹¹ *McAlexander v. Wright*, 3 T. B. Mon. (Ky.) 189, 16 Am. Dec. 93; *Smith v. Black*, 51 Md. 247; *Henck v. Todhunter*, 7 Har. & J. (Md.) 275, 16 Am. Dec. 300; *Eickman v. Troll*, 29 Minn. 124 (a letter held to authorize); *Hardin v. Ho-yo-po-nubby's Lessee*, 27 Miss. 567; *Bunton v. Lyford*, 37 N. H. 512, 75 Am. Dec. 144; *Manchester Bank v. Fellows*, 28 N. H. 302; *Gaul v. Groat*, 1 Cow. (N. Y.) 113.

¹² *Orr v. Brown*, 69 Fed. 216; *Christian & Craft Co. v. Coleman*, 125 Ala. 158; *Hood v. Ware*, 34 Ga. 328; *Neff v. Smyth*, 111 Ill. 100;

is necessary is the evidence of circumstances that show an intention on the part of the client to employ the attorney, and a willingness on the part of the latter to act for him. Thus, where an attorney at law, as such, is called upon for "legal advice" by a person acting for himself, and he thereupon assumes to give a professional opinion in relation to the matter as to which he is consulted, the relation of attorney and client arises between him and the person consulting him.¹³

§ 631. Employment of attorney by an agent.

It is not necessary that this employment of an attorney should be made by the client in person, but like other contracts may be made through a duly authorized agent, and if the agent acts in accordance with his authority, the attorney will be the attorney of the client and not of the agent.¹⁴ Thus an agent's act in sending process served on his principal to attorneys "for such action as they may deem necessary" in contemplated litigation amounts to a retainer of such attorneys for the principal.¹⁵ But if the agent is not authorized to employ an attorney and he does employ one, the relation of attorney and client does not exist between such attorney and the original employer.¹⁶ In order that such an appointment may be established, it must be shown that the agent had authority, express or implied, from his principal

Strean v. Lloyd, 128 Ill. 493; *Burnham v. Roberts*, 70 Ill. 19; *Clark v. Lilliebridge*, 45 Kan. 567; *Hallam v. Bardsley*, 7 Ky. L. R. 516; *Mendel v. Kinnimouth*, 13 Ky. L. R. 139; *African M. B. Church v. Carmack*, 2 Md. Ch. 143; *Perry v. Lord*, 111 Mass. 504; *Holden v. Greve*, 41 Minn. 173; *Grayson v. Wilkinson*, 5 Smedes & M. (Miss.) 268; *Eoff v. Irvine*, 108 Mo. 378, 32 Am. St. Rep. 609; *Marye v. Martin*, 9 Nev. 28; *Goodall v. Bedel*, 20 N. H. 205; *Toplitz v. Meyer*, 34 Misc. (N. Y.) 786; *Brown v. Travelers' L. & A. Ins. Co.*, 26 App. Div. (N. Y.) 544; *Arrington v. Arrington*, 102 N. C. 491; *Sullivan v. Su-song*, 40 S. C. 154; *Fore v. Chandler*, 24 Tex. 146.

¹³ *Ryan v. Long*, 35 Minn. 394; *Perkins v. West Coast Lumber Co.*, 129 Cal. 427; *McCreary v. Hoopes*, 25 Miss. 428.

¹⁴ *Porter v. Peckham*, 44 Cal. 204.

¹⁵ *Toplitz v. Meyer*, 34 Misc. (N. Y.) 786.

¹⁶ *Hoover v. Wise*, 91 U. S. 308; *Milligan v. Ala. Fertilizer Co.*, 89 Ala. 322; *Lewis v. Peck*, 10 Ala. 142; *Bradstreet v. Everson*, 72 Pa. 124, 13 Am. Rep. 665.

to make it. It cannot be established by the fact that the agent claimed to have such authority. An attorney cannot establish his appointment as attorney for the defendant in an action against the latter to recover attorney's fees by evidence that one who claimed to be the agent of defendant had appointed him as its attorney.¹⁷

§ 632. Scope of retainer.

When an attorney is retained to act in any particular matter, ordinarily his authority does not extend to any other matter or suit than that in respect to which he was employed, unless there were special circumstances permitting it.¹⁸ Thus, where an attorney is employed by a railroad company to conduct condemnation proceedings for a right of way across certain land, he has no authority to bind the company by an agreement for the payment of damages to one not a party to the suit, on account of interference with his logging road across the right of way;¹⁹ nor can such attorney agree that the company will maintain a crossing at a certain point.²⁰ So where an attorney has authority to bring and carry on a certain suit, it does not include authority to represent the plaintiff therein in an action brought against him for damages for the wrongful issuance of an attachment in such suit.²¹ Nor do counsel who undertake to defend a client upon a criminal accusation thereby agree to defend his bailors upon a *scire facias* on the recognizance.²² However, this rule does not affect the general rule that when an attorney is employed for a particular purpose he has implied authority to use all measures incidental and necessary to accomplish such purpose.²³

¹⁷ *Southern Home Bldg. & Loan Ass'n v. Butt*, 77 Miss. 944.

¹⁸ *McCutcheon v. Loud*, 71 Mich. 433; *Pitt v. Davison*, 37 Barb. (N. Y.) 97; *Walradt v. Maynard*, 3 Barb. (N. Y.) 584; *Jacobs v. Copeland*, 54 Me. 503.

¹⁹ *Haynes v. Tacoma, O. & G. H. R. Co.*, 7 Wash. 211.

²⁰ *Wood v. Hamilton & N. W. R. Co.*, 25 Grant's Ch. 135.

²¹ *Barnes v. Profillet*, 5 La. Ann. 117.

²² *Headley v. Good*, 24 Tex. 232.

²³ *Scott v. Elmendorf*, 12 Johns. (N. Y.) 317; *Steward v. Biddlecum*, 2 N. Y. 103; *Day v. Welles*, 31 Conn. 344; *Pierce v. Strickland*,

§ 633. Notice to attorney as notice to client.

(a) **General rule.**—It is a well established doctrine of the law of agency that notice to an agent, during the course of his employment, and in reference to the transactions in which he is employed, is notice to the principal. And the same principles which govern this rule likewise apply to the relation of attorney and client. It may be stated as a general rule, then, that notice given to, or knowledge acquired by, an attorney in regard to the matter in which he is at the time engaged for his client, and he is at liberty to communicate it to his client, is imputed to the latter.²⁴ A bill of review, to rehear and

2 Story, 292, Fed. Cas. No. 11,147; *W. W. Kimball Co. v. Payne*, 9 Wyo. 441. See post, § 642.

²⁴ *Dixon v. Winch*, 69 Law J. Ch. 465, 82 Law T. (N. S.) 437; *Rogers v. Palmer*, 102 U. S. 263; *Price v. Carney*, 75 Ala. 546; *Pepper v. George*, 51 Ala. 190; *Dorland v. Smith*, 93 Cal. 120; *Bierce v. Red Bluff Hotel Co.*, 31 Cal. 160; *Watson v. Sutro*, 86 Cal. 500; *Sweeney v. Pratt*, 70 Conn. 274, 66 Am. St. Rep. 101; *Patten v. Warner*, 11 App. D. C. 149; *Brown v. Oattis*, 55 Ga. 416; *Jones v. Lamon*, 92 Ga. 529; *Tisdale v. Bark Almy*, 4 Hawaii, 503; *Williams v. Tatnall*, 29 Ill. 553; *Haas v. Sternbach*, 156 Ill. 44; *Webber v. Clark*, 136 Ill. 256; *Coryell v. Klehm*, 157 Ill. 462; *Dorrance v. McAlester*, 1 Ind. T. 473; *Allen v. McCalla*, 25 Iowa, 464, 96 Am. Dec. 56; *Walker v. Schreiber*, 47 Iowa, 529; *De Louis v. Meek*, 2 G. Greene (Iowa) 55, 50 Am. Dec. 491; *Blake v. Clary*, 83 Me. 154; *Baltimore v. Whittington*, 78 Md. 231; *Shartzler v. Mountain Lake Park Ass'n*, 86 Md. 335; *Bates v. A. E. Johnson Co.*, 79 Minn. 354; *Edwards v. Hillier*, 70 Miss. 803; *Bank of Commerce v. Hoeber*, 88 Mo. 37, 57 Am. Rep. 359; *Hedrick v. Beeler*, 110 Mo. 91; *Butler v. Morse*, 66 N. H. 429; *Lyons v. Walt*, 51 N. J. Eq. 60; *Taft v. Wright*, 47 How. Pr. (N. Y.) 1; *Hyde v. Bloomingdale*, 23 Misc. (N. Y.) 728; *Pierce v. Perkins*, 17 N. C. (2 Dev. Eq.) 250; *Hulbert v. Douglas*, 94 N. C. 122; *Barnes v. McClinton*, 3 Pen. & W. (Pa.) 67, 23 Am. Dec. 62; *Peeples v. Warren*, 51 S. C. 560; *American F. L. Mortg. Co. v. Felder*, 44 S. C. 478; *Riordan v. Britton*, 69 Tex. 198, 5 Am. St. Rep. 37; *Van Hook v. Walton*, 28 Tex. 59; *Vermont Min. & Quarrying Co. v. Windham County Bank*, 44 Vt. 489; *Wells v. McMahon*, 3 Wash. T. 532; *Hyman v. Barmon*, 6 Wash. 516; *Melms v. Pabst Brew. Co.*, 93 Wis. 153, 57 Am. St. Rep. 899. In *Daniels v. Pratt*, 6 Lea (Tenn.) 443, it is held that generally notice of the assignment of the judgment to an attorney employed to defend on the action would not be notice to his client, but the question is reserved whether the agency of the attorney may not be such, by the course of business or contract, as to make notice to him sufficient. If the notice comes to the attorney

set aside a decree, upon the ground of newly discovered testimony, cannot be sustained, if it appears that the testimony, though unknown to the plaintiff, was known to his attorney, in time to have been used.²⁵ The whole doctrine of imputed notice to the client rests upon the ground that the attorney has knowledge of something, material to the particular transaction, which it is his duty to communicate to his client or principal.²⁶ And since it is his duty to make such communication, the law will presume that it has been made. This presumption is conclusive and the client therefore will be considered to have actual knowledge of the information acquired by his attorney, and will not be allowed to rebut such presumption in order that he might obtain the rights and equities of a purchaser without notice.²⁷

(b) **Where unauthorized acts are ratified.**—And the same rule applies where a client ratifies the unauthorized acts of an attorney. Where an attorney acts in a transaction without authority, but his client subsequently ratifies his action, the client will be charged with notice of all facts communicated to the attorney during the transaction which the client subsequently ratified.²⁸

(c) **What notice is binding.**—It must not be supposed, however, that all knowledge or information, of which the attorney has notice or which he has acquired, in regard to the subject-matter of his employment, will be imputed to and binding upon his client. It may have been acquired by him at another time, or in some other transaction, and he has forgotten all about it, or there may be certain circumstances sur-

in such a manner that he may communicate it to his client, or act upon it without any violation of duty, it is binding on his client. *Lit-tauer v. Houck*, 92 Mich. 162, 31 Am. St. Rep. 572.

²⁵ *Greenlee v. McDowell*, 39 N. C. (4 Ired. Eq.) 481.

²⁶ *Melms v. Pabst Brew. Co.*, 93 Wis. 153, 57 Am. St. Rep. 908; *Wyllie v. Pollen*, 3 De Gex, J. & S. 601; *Wittenbrock v. Parker*, 102 Cal. 93, 41 Am. St. Rep. 172.

²⁷ *Watson v. Sutro*, 86 Cal. 500; *Wittenbrock v. Parker*, 102 Cal. 93, 41 Am. St. Rep. 172.

²⁸ *Lampkin v. First Nat. Bank*, 96 Ga. 487; *Hovey v. Blanchard*, 13 N. H. 145; *Haas v. Sternbach*, 156 Ill. 44, affirming 50 Ill. App. 476.

rounding the case, by reason of which there would be no duty upon him, and he would not be expected to communicate to the client the information he had acquired. In order that such notice or knowledge to the attorney may be binding upon the client, it must be acquired by such attorney, except in special cases, after the relation has commenced and during its existence, and it must be of facts connected with the business in which he is retained;²⁹ it is only in special cases, as we shall see hereafter, that the rule applies to knowledge or notice acquired or received before the relation began or after it has ended. Where one simply consults another, who is an attorney, as to a certain land title, but does not employ him to examine it or pay him a retainer, the relation does not exist between them, and he is not chargeable with knowledge of any facts relating to such title which the attorney may know.³⁰ So a client is not chargeable with notice of facts on the ground that they were known by his attorney, if the knowledge of the attorney was acquired while he was acting as the attorney of another person.³¹ From these cases the rule seems to be that if the attorney

²⁹ *McCormick v. Joseph*, 83 Ala. 401, *Huffcut*, Cas. 279; *Frenkel v. Hudson*, 82 Ala. 158; *Pepper v. George*, 51 Ala. 190; *Wittenbrock v. Parker*, 102 Cal. 93, 41 Am. St. Rep. 172; *Chapman v. Hughes* (Cal.) 60 Pac. 974; *Cartwright v. Everett*, 7 Hawaii, 216; *Campbell v. Benjamin*, 69 Ill. 244; *Atchison, T. & S. F. R. Co. v. Benton*, 42 Kan. 698; *Adams v. Henning*, 9 La. Ann. 225; *Fairfield Sav. Bank v. Chase*, 72 Me. 226, 39 Am. Rep. 319; *Warner v. Hall*, 53 Mich. 371; *Bates v. Johnson*, 79 Minn. 354; *Trentor v. Pothén*, 46 Minn. 298, 24 Am. St. Rep. 225; *Butler v. Morse*, 66 N. H. 429; *Tucker v. Tilton*, 55 N. H. 223; *Fidelity Trust Co. v. Baker*, 60 N. J. Eq. 170; *Denton v. Ontario County Nat. Bank*, 150 N. Y. 126; *Hoover v. Greenbaum*, 62 Barb. (N. Y.) 188; *Arrington v. Arrington*, 114 N. C. 151; *Hood v. Fahnestock*, 8 Watts (Pa.) 489, 34 Am. Dec. 489; *Steinmeyer v. Steinmeyer*, 55 S. C. 9; *Kirklin v. Atlas Sav. & Loan Ass'n* (Tenn. Ch. App.) 60 S. W. 149; *Neilson v. Weber*, 107 Tenn. 161; *Meuley v. Zeigler*, 23 Tex. 88; *Taylor v. Evans*, 16 Tex. Civ. App. 409; *Beck v. Avondino*, 20 Tex. Civ. App. 330; *Pacific Mfg. Co. v. Brown*, 8 Wash. 347; *Melms v. Pabst Brew. Co.*, 93 Wis. 153, 54 Am. St. Rep. 899.

³⁰ *Arrington v. Arrington*, 114 N. C. 151.

³¹ *Herrington v. McCollum*, 73 Ill. 476; *McCormick v. Wheeler*, 36 Ill. 116, 85 Am. Dec. 388; *Ford v. French*, 72 Mo. 250.

has acquired his notice or knowledge before the relation has commenced, or in another and separate transaction for the same client, such notice or knowledge will not be imputed to the client in the present transaction.

In other cases, however, this rule has been disputed, and the proper subject of inquiry thought to be whether the knowledge acquired by an attorney before the relation began or in another transaction was present in his mind at the time he acted in the particular business for the client who is sought to be charged with such knowledge and is of such a character that it might be communicated; and if this is shown such knowledge will be imputed to the latter client, although it was acquired by the attorney previous to his employment, or in another transaction.³² "Where one of two matters transacted by the same attorney, though the former was for another client, follows so soon after the other that it clearly appears that the earlier transaction cannot have been out of the mind of the attorney when engaged in the latter, there is no ground for restricting the notice to the client to the second transaction, but he will be affected with both."³³ But "the furthest that has been gone in the way of holding a principal chargeable with knowledge of facts communicated to his agent, where the notice was not received or the knowledge obtained in the very transaction in

³² *Constant v. University of Rochester*, 111 N. Y. 607, 7 Am. St. Rep. 769, *Huffcut, Cas.* 274; *The Distilled Spirits*, 11 Wall. (U. S.) 356, *Huffcut, Cas.* 271; *Wittenbrock v. Parker*, 102 Cal. 93, 41 Am. St. Rep. 172; *Slattery v. Schwannecke*, 118 N. Y. 543; *Constant v. University of Rochester*, 133 N. Y. 642; *Mountford v. Scott*, 1 Turn. & R. 274; *Dresser v. Norwood*, 17 C. B. (N. S.) 466; *Abell v. Howe*, 43 Vt. 403; *Hart v. Farmers' & Mechanics' Bank*, 33 Vt. 252; *Deering v. Holcomb*, 26 Wash. 588.

"It may fall to be considered whether one transaction might not follow so close upon the other as to render it impossible to give a man credit for having forgotten it. I should be unwilling to go so far as to say, that if an attorney has notice of a transaction in the morning, he shall be held in a court of equity to have forgotten it in the evening; it must in all cases depend upon the circumstances." By Lord Eldon, in *Mountford v. Scott*, Turn. & R. 274.

³³ *Melms v. Pabst Brew. Co.*, 93 Wis. 153, 57 Am. St. Rep. 906; *Brothers v. Bank of Kaukauna*, 84 Wis. 395, 36 Am. St. Rep. 932, and authorities cited.

question, has been to hold the principal chargeable upon clear proof that the knowledge which the agent once had, and which he had obtained in another transaction, at another time and for another principal, was present to his mind at the very time of the transaction in question."³⁴

— **Knowledge of illegal purpose.** Where the communication made to an attorney was in reference to an illegal purpose, it is not a professional communication, such as it would be unprofessional in him to communicate to a second client, and the latter would be charged with notice of such information, if it had been communicated sufficiently recent to justify the belief that such information was fresh in his memory while he was acting for the second client.³⁵ Thus, where an insolvent contemplating making an assignment for the benefit of creditors, delays executing it in order that certain of them may secure preferences, and communicates this purpose to his attorney, who is soon afterwards employed by such creditors to levy the writs, the latter are chargeable with the information possessed by the attorney.³⁶

(d) **What notice not binding.**—The rule, as stated heretofore, is based upon the duty of the attorney to disclose to his client all knowledge and information he possessed at the time, in relation to the subject-matter of the employment, and the presumption is that he communicates it accordingly; but he cannot be expected to communicate that which he has forgotten, or that which it would be his professional duty to conceal, or information which, from his relation to the subject-matter or his previous conduct, it is certain that he would not disclose. In such cases the client would not be bound by the notice or knowledge of his attorney.³⁷ As

³⁴ *Constant v. University of Rochester*, 111 N. Y. 607, 611, 7 Am. St. Rep. 769.

³⁵ *Taylor v. Evans*, 16 Tex. Civ. App. 409.

³⁶ *Taylor v. Evans*, 16 Tex. Civ. App. 409.

³⁷ *The Distilled Spirits*, 11 Wall. (U. S.) 356, Huffcut, Cas. 271; *Cave v. Cave*, 15 Ch. Div. 639; *Kennedy v. Green*, 3 Mylne & K. 699; *McCormick v. Wheeler*, 36 Ill. 116, 85 Am. Dec. 388; *Herrington v. McCollum*, 73 Ill. 476; *Littauer v. Houck*, 92 Mich. 162, 31 Am. St. Rep. 572; *Ford v. French*, 72 Mo. 250; *Olyphant v. Phyfe*, 48 App. Div. 1, 166 N. Y. 630; *Wright v. Snell*, 22 Ohio Circ. R. 86;

said by Mr. Justice Bradley: "When it is not the agent's duty to communicate such knowledge, when it would be unlawful for him to do so, as, for example, when it has been acquired confidentially as attorney for a former client, the reason of the rule ceases, and in such case an agent would not be expected to do that which would involve the betrayal of professional confidence, and his principal ought not to be bound by his agent's secret and confidential information."³⁸ Thus the client will not be charged with notice of a fraud or wrong to which his attorney was a party while employed by another, and which it is quite certain he would conceal.³⁹ Or if a person, intending to purchase real estate, employs the attorney of his vendor to act as his attorney, and such attorney has, in his previous employment by the vendor, obtained knowledge of facts on account of which the title of the latter may be impeached, it is not to be expected that he will disclose such knowledge to the purchaser, and the latter is not chargeable therewith.⁴⁰ Nor would the attorney's knowledge of the vendor's insolvency be binding on the purchaser, where he was employed by the latter to only examine the title.⁴¹ Nor would notice to a debtor's attorney, acquired

Martin v. Jackson, 27 Pa. 504, 67 Am. Dec. 489; *Hood v. Fahnestock*, 8 Watts (Pa.) 489, 34 Am. Dec. 489; *Bracken v. Miller*, 4 Watts & S. (Pa.) 111; *Melms v. Pabst Brew. Co.*, 93 Wis. 153, 57 Am. St. Rep. 899.

In *Waldy v. Gray*, L. R. 20 Eq. 252, *Bacon, V. C.*, says: "I take it to be very clearly established that if a person employed as a solicitor has done things which if disclosed would prevent the perfection of the security on which he is engaged, which would show that a good title does not exist to that which he is the instrument of conveying to the purchaser, it is not to be expected or inferred that he would communicate what he has done to his clients."

³⁸ *The Distilled Spirits*, 11 Wall. (U. S.) 367, *Huffcut, Cas.* 273.

³⁹ *Melms v. Pabst Brew. Co.*, 93 Wis. 153, 57 Am. St. Rep. 899; *Kettlewell v. Watson*, 21 Ch. Div. 707; *Kennedy v. Green*, 3 Mylne & K. 699; *Waldy v. Gray*, L. R. 20 Eq. 251; *Cave v. Cave*, 15 Ch. Div. 639, 49 Law J. Ch. 505.

⁴⁰ *Melms v. Pabst Brew. Co.*, 93 Wis. 153, 57 Am. St. Rep. 899; *Scotch Lumber Co. v. Sage*, 132 Ala. 598.

⁴¹ *Weil v. Reiss*, 167 Mo. 125.

after judgment against the debtor, of the creditor's general assignment, be notice to the debtor.⁴²

(e) **Where attorney acts for both parties.**—There may be cases in which the same attorney is employed by, and to some extent acts for, both parties in the same transaction, as where in the purchase and sale of real estate the same attorney is employed by both the purchaser and the vendor. In such a case the knowledge or information acquired by him from either party will be imputed to the other, and it has been held that the purchaser will be affected with notice of whatever such attorney acquired notice of, in his capacity of attorney for either vendor or purchaser, in the transaction in which he was so employed.⁴³ But where the relation has ceased, the client cannot be affected by knowledge subsequently acquired by the attorney while acting as agent for one who was the opposite party in a previous transaction in which the attorney acted for such client. Thus, the fact that the attorney for a pledgee was also attorney for the purchasers of the pledge at the auction sale, in a prior proceeding in which the pledge was attached in the hands of the pledgee for a debt due to such purchasers, does not operate to charge such purchasers with the knowledge of the attorney as an irregularity in the sale, where there is no evidence that the attorney had any communication with them in reference to their becoming purchasers at, or acted as their attorney in any way in connection with, the sale.⁴⁴

(f) **Where a firm of attorneys has been employed.**—It is a doctrine of the law of partnership that all acts done or information obtained by one or more members of a firm or partnership, whilst engaged in partnership business, are considered as the acts or information of the whole firm. Hence if a client employs a law firm, consisting of two or more attorneys, he is charged with notice given to, or knowledge

⁴² *Chicago Sugar-Refining Co. v. Jackson Brew. Co.* (Tenn. Ch. App.) 48 S. W. 275.

⁴³ *Melms v. Pabst Brew. Co.*, 93 Wis. 153, 57 Am. St. Rep. 899. And see *Rolland v. Hart*, 6 Ch. App. 678, 40 Law J. Ch. 701. Compare *Constant v. University of Rochester*, 111 N. Y. 604, *Huffcut, Cas.* 274, where this principle is discussed but not decided.

⁴⁴ *McCutcheon v. Dittman*, 23 App. Div. (N. Y.) 285.

acquired by, any member or members of such firm, although that particular member was not engaged in transacting business for the client, and the member who really did have charge of such business had not received any notice or obtained any information of the fact with notice or knowledge of which the client is charged.⁴⁵ But knowledge acquired by one member of a firm of attorneys in an entirely different and independent transaction will not be imputed to another member of the firm in another transaction in reference to the same subject-matter, so as to charge therewith a client for whom the latter member is acting.⁴⁶

(g) **Where several attorneys act for the same client.**—Where the client, whether he be an individual or a corporation, has employed several attorneys, each having charge of a particular branch of business, and also has another attorney as a general supervisor over all, and this general attorney has obtained information in respect to a certain transaction or business not committed to his care, but such business was under the charge of the attorney who was the head of that particular branch of the business, and the latter had not notice or knowledge of the fact with which his client is sought to be affected, such information will not be imputed to the client so as to charge him.⁴⁷ Thus, where a railway company is sought to be charged with knowledge of facts known to its general attorney, but not known to the attorney who had charge of that particular class of the business, the court said: "Any matters requiring legal attention or

⁴⁵ *Wittenbrock v. Parker*, 102 Cal. 93, 41 Am. St. Rep. 172; *Smith v. Willson*, 1 Tex. Civ. App. 115.

⁴⁶ If one member of a firm of attorneys, by mistake in drafting an intended partial release of a mortgage, releases the whole, and such release is placed upon record, and at a subsequent time another loan is negotiated, and the borrower employs the same firm to examine the title for him, and it is examined by another member of the firm who had no knowledge of the previous transaction and no information respecting the title except such as is disclosed by the abstract, the borrower is not charged with notice of the mistake made by the other member of the firm, nor of the fact that a partial release only of the mortgage was intended. *Wittenbrock v. Parker*, 102 Cal. 93, 41 Am. St. Rep. 172.

⁴⁷ *Atchison, T. & S. F. R. Co. v. Benton*, 42 Kan. 698.

advice are referred to the general attorney by the department having special charge thereof, or by the president or general manager; but prior to the commencement of an action in a court against the company, notice to the general attorney of matters solely under the control of another department is not notice to that department or to the company, unless, prior to such notice, the attorney has been directed to take charge of the subject matter of the notice."⁴⁸

(h) **Where client is a collection agency.**—Where an attorney is employed to act for a collection agency, which has engaged to collect claims for the owners, it is held that such attorney is the attorney of the collection agency and not of the owners of the claims, and hence knowledge acquired by such attorneys in reference to the claims is not imputed to the owners of the claims, but to the collection agency.⁴⁹

II. APPEARANCE BY AN ATTORNEY.

§ 634. Presumptively authorized.

As an attorney is an officer of the court and is responsible to it for the proper conduct of his professional duties, and exercise of the license granted him, there is always a presumption that he will not violate these duties, nor improperly use the privileges accorded him. Accordingly it is a general rule that the mere appearance on record of an attorney, as such, regularly admitted to practice, is presumptive evidence, in the absence of anything to the contrary, that he has proper authority from his client to make such appearance for him, and unless properly called for he will not be required to show his authority.⁵⁰ Thus it is not necessary for the

⁴⁸ *Atchison, T. & S. F. R. Co. v. Benton*, 42 Kan. 698.

⁴⁹ *Hoover v. Wise*, 91 U. S. 308, affirming 61 N. Y. 305.

⁵⁰ *United States: Osborn v. United States Bank*, 9 Wheat. 738; *Bonnifield v. Thorp*, 71 Fed. 924; *Hill v. Mendenhall*, 21 Wall. 453; *In re Gasser*, 104 Fed. 537.

Arizona: Clark v. Morrison (Ariz.) 52 Pac. 985.

Arkansas: Tally v. Reynolds, 1 Ark. 99, 31 Am. Dec. 737; *State v. Baxter*, 38 Ark. 462.

California: San Luis Obispo County v. Hendricks, 71 Cal. 242; *Hunter v. Bryant*, 98 Cal. 248; *Hayes v. Shattuck*, 21 Cal. 52; *San Francisco Sav. Union v. Long*, 123 Cal. 107.

attorney to show his authority, whether the suit be by a corporation or by an individual, in order to the progress of

Georgia: Dobbins v. Dupree, 39 Ga. 394; Hirsch v. Fleming, 77 Ga. 594; Alexander v. State, 56 Ga. 478; Bigham v. Kistler, 114 Ga. 453.

Illinois: Leslie v. Fischer, 62 Ill. 118; Williams v. Butler, 35 Ill. 544; Ferris v. Commercial Nat. Bank, 158 Ill. 237; Famous Mfg. Co. v. Wilcox, 180 Ill. 246.

Indiana: Indiana, B. & W. R. Co. v. Maddy, 103 Ind. 200.

Iowa: Harshey v. Blackmarr, 20 Iowa, 161, 89 Am. Dec. 520; Wheeler v. Cox, 56 Iowa, 36; State v. Carothers, 1 G. Greene, 464; Reid v. Dickinson, 37 Iowa, 56.

Kansas: Reynolds v. Fleming, 30 Kan. 106, 46 Am. Rep. 86; Esley v. People, 23 Kan. 510; Neosho County Com'rs v. Leahy, 24 Kan. 60.

Kentucky: Howe v. Anderson (Ky.) 14 S. W. 216; Noble v. Bank of Ky., 3 A. K. Marsh. 262.

Louisiana: Postal Telegraphic Cable Co. v. Louisville, N. O. & T. R. Co., 43 La. Ann. 522; Bender v. McDowell, 46 La. Ann. 393; New Orleans v. Steinhardt, 52 La. Ann. 1043; Taylor v. New Orleans, 41 La. Ann. 891.

Maine: Flint v. Comly, 95 Me. 251; Penobscot Boom Corp. v. Lamson, 16 Me. 224, 33 Am. Dec. 656.

Maryland: Henck v. Todhunter, 7 Har. & J. 275, 16 Am. Dec. 300; Dorsey v. Kyle, 30 Md. 512, 96 Am. Dec. 617; Kelso v. Stigar, 75 Md. 378; Hager v. Abrahams, 66 Md. 253.

Massachusetts: Steffe v. Old Colony R. Co., 156 Mass. 262.

Michigan: Corbitt v. Timmerman, 95 Mich. 581, 35 Am. St. Rep. 586; Norberg v. Heineman, 59 Mich. 210; Arnold v. Nye, 23 Mich. 286.

Minnesota: Gemmell v. Rice, 13 Minn. 400 (Gil. 371).

Mississippi: Hardin v. Ho-yo-po-nubby's Lessee, 27 Miss. 567; Schirling v. Scites, 41 Miss. 644; Lester v. Watkins, 41 Miss. 647.

Missouri: Valle v. Picton, 91 Mo. 207, 16 Mo. App. 178; Ring v. Charles Vogel Paint Glass Co., 46 Mo. App. 374; State v. Crumb, 157 Mo. 545.

Nebraska: Kirschbaum v. Scott, 35 Neb. 199; Vorce v. Page, 28 Neb. 294; Missouri Pac. R. Co. v. Fox, 56 Neb. 746.

Nevada: State v. Cal. Min. Co., 13 Nev. 203; Hoppin v. First Nat. Bank, 25 Nev. 84.

New Hampshire: Manchester Bank v. Fellows, 28 N. H. 302; Beckley v. Newcomb, 24 N. H. 359.

New Jersey: Norris v. Douglass, 5 N. J. Law, 817; Dey v. Hathaway Printing Telegraph & Tel. Co., 41 N. J. Eq. 419; Easton & A. R. Co. v. Greenwich Tp., 25 N. J. Eq. 565.

New York: Denton v. Noyes, 6 Johns. 298, 5 Am. Dec. 237; Amer-

the suit, unless it is called for by the other party.⁵¹ So it is the settled rule that although an attorney cannot without special authority admit service of jurisdictional process upon

ican Ins. Co. v. Oakley, 9 Paige, 496, 38 Am. Dec. 561; Howard v. Smith, 33 N. Y. Super. Ct. 124; Hamilton v. Wright, 37 N. Y. 502.

Ohio: Pillsbury v. Dugan's Adm'r, 9 Ohio, 117, 34 Am. Dec. 427.

Pennsylvania: Cyphert v. McClune, 22 Pa. 195; McCullough v. Guetner, 1 Bin. 214; Miller v. Preston, 154 Pa. 63.

South Carolina: Sanders v. Price, 56 S. C. 1.

South Dakota: Noyes v. Belding, 5 S. D. 603.

Tennessee: Rogers v. Park's Lessees, 4 Humph. 480; Foster v. Blount, 1 Overt. 343.

Texas: Williams v. Nolan, 58 Tex. 708; Holder v. State, 35 Tex. Cr. R. 19; Fowler v. Morrill, 8 Tex. 153.

Vermont: Proprietors, etc., in Addison v. Bishop, 2 Vt. 231.

Virginia: Fisher v. March, 26 Grat. 765; Willson v. Smith, 22 Grat. 494.

West Virginia: Low v. Settle, 22 W. Va. 387.

Wisconsin: Schlitz v. Meyer, 61 Wis. 418; Thomas v. Steele, 22 Wis. 207; Andrews v. Thayer, 30 Wis. 228.

Chief Justice Marshall, in Osborn v. United States Bank, 9 Wheat. (U. S.) 830, says: "Certain gentlemen, first licensed by the government, are admitted by order of court, to stand at the bar, with a general capacity to represent all the suitors in the court. The appearance of any one of these gentlemen in a cause has always been received as evidence of his authority; and no additional evidence, so far as we are informed, has ever been required." So in Hardin v. Ho-yo-po-nubby's Lessee (27 Miss. 579) the following language is used: "An attorney is an officer of court, and responsible to the court for the propriety of his professional conduct, and the proper use of the privileges he has, as such. * * * He is permitted by almost universal practice in this country, to do so under verbal retainer, and it is only in cases of clear want of authority or abuse of his privilege that he is held to be incompetent to institute a suit or to represent a party in court. The presumption is in favor of his authority, and though he may be required to show it, yet if he acts

⁵¹ Osborn v. United States Bank, 9 Wheat. (U. S.) 738; Leslie v. Fischer, 62 Ill. 118; State v. Carothers, 1 G. Greene (Iowa) 464; Succession of Patrick, 20 La. Ann. 204; Penobscot Boom Corp. v. Lamson, 16 Me. 224, 33 Am. Dec. 656; Steffe v. Old Colony R. Co., 156 Mass. 262; Hardin v. Ho-yo-po-nubby's Lessee, 27 Miss. 567; Manchester Bank v. Fellows, 28 N. H. 302; Jackson v. Stewart, 6 Johns. (N. Y.) 34; Gaul v. Groat, 1 Cow. (N. Y.) 113; Rogers v. Park, 4 Humph. (Tenn.) 480; and see cases cited ante, note 50.

his client, yet it will be presumed in all collateral proceedings, and perhaps on appeal or in error, that a regular attorney at law who appeared for the defendant, though not served with process, had authority to do so.⁵² But although the authority of an attorney appearing in open court will be presumed to be regular until the contrary is shown, yet, in vacation, authority to confess judgment must affirmatively appear; no presumption will be indulged as to his authority in such a case.⁵³

This presumption, however, exists only in favor of attorneys at law and does not extend to one who is not an attorney. Thus, where an act purports to have been done by an attorney, for example, the waiver of the service of process, and it does not appear that the agent or attorney is an attorney at law, there is no presumption of authority, and the want of authority may be assigned for error by the party thus represented.⁵⁴

§ 635. Presumption is not conclusive.

Although this presumption of attorney's authority is *prima facie* good, and will stand until overcome by clear and satisfactory proof,⁵⁵ yet it is not a conclusive presumption, and

in good faith and the want of authority is not manifest, he will not be held to have acted without authority, because it is not shown according to strictly legal rules. If this were not so the greatest inconvenience in practice would continually occur both to clients and attorneys; for suits are frequently instituted by attorneys under the authority of letters from their clients, who are strangers, and whose handwriting is unknown to them, and could not be proved without great trouble and delay. * * * All that is required to be shown in such cases in the first instance, is, that the attorney has acted in good faith and under an authority appearing to be genuine, though informal."

⁵² *Lagow v. Patterson*, 1 Blackf. (Ind.) 327 (on appeal); *Hills v. Ross*, 3 Dall. (U. S.) 331 (on appeal); *Osborn v. United States Bank*, 9 Wheat. (U. S.) 738, 829 (in error); *Shelton v. Tiffin*, 6 How. (U. S.) 163, 186; *Harshey v. Blackmarr*, 20 Iowa, 161, 89 Am. Dec. 520; *Prince v. Griffin*, 16 Iowa, 552.

⁵³ *Martin v. Judd*, 60 Ill. 78.

⁵⁴ *Fowler v. Morrill*, 8 Tex. 153; *Stevens v. Fuller*, 55 N. H. 443.

⁵⁵ *Wheeler v. Cox*, 56 Iowa, 37; *State v. Carothers*, 1 G. Greene (Iowa) 464; *Vorce v. Page*, 28 Neb. 294.

in a proper case, and if done in proper time, it may be rebutted by evidence tending to show that the attorney had not, in fact, the authority he assumed to possess.⁵⁶ Although "the authority of an attorney to appear for another in a court of justice is generally presumed, nevertheless the court has the inherent power to determine by what authority an attorney appears, either to prosecute or defend, in the name of another, whether the person for whom the attorney assumes to act be a natural or an artificial person."⁵⁷ But, if one of the parties intends to dispute this presumption of authority, he must do so at the proper time or it may be lost by laches.⁵⁸ Thus, it is too late to question it on appeal,⁵⁹ or, as has been held, after the end of the term at which the appearance was made.⁶⁰ The supreme court cannot inquire into the authority of the attorney to appear in the circuit court, when no objection was made there,⁶¹ as the determination of the authority of an attorney to appear in a case is a question peculiarly within the province of the court trying the case.⁶²

Although the court thus has the power to compel the attorney to show his authority, it will not usually do so of its own motion, but will act only where there has been a complaint and proof of lack of authority by one of the parties.

§ 636. When and by whom this presumption may be rebutted.

This presumption may be rebutted, and an investigation by the court be called for, under various circumstances.

⁵⁶ *Great West Min. Co. v. Woodmas & A. Min. Co.*, 12 Colo. 46, 13 Am. St. Rep. 204; *Dobbins v. Dupree*, 39 Ga. 394; *Leslie v. Fischer*, 62 Ill. 118; *Rosellus v. Delachaise*, 5 La. Ann. 581, 52 Am. Dec. 597; *Dockham v. Potter*, 27 La. Ann. 73; *Vorce v. Page*, 28 Neb. 294.

⁵⁷ *Williams v. Uncompahgre Canal Co.*, 13 Colo. 469; *King of Spain v. Oliver*, 2 Wash. 429, Fed. Cas. No. 7,814; *American Ins. Co. v. Oakley*, 9 Paige (N. Y.) 496, 38 Am. Dec. 561; *San Francisco Sav. Union v. Long*, 123 Cal. 107.

⁵⁸ *Haddock v. Wright*, 25 Fla. 202.

⁵⁹ *Noble v. State Bank*, 3 A. K. Marsh. (Ky.) 263; *Bogardus v. Livingston*, 2 Hilt. (N. Y.) 236; *Shroudenbeck v. Phoenix F. Ins. Co.*, 15 Wis. 632.

⁶⁰ *Knowlton v. Plantation No. 4*, 14 Me. 20.

⁶¹ *Talbot v. McGee*, 4 T. B. Mon. (Ky.) 377; *Cockran v. Leister*, 2 Root (Conn.) 348.

⁶² *Krause v. Hampton*, 11 Iowa, 457; *Clark v. Holliday*, 9 Mo. 711.

Either the client or the opposite party may make application for an investigation by the court during the pendency of legal proceedings. Or the question may arise in a subsequent action on the judgment obtained through his unauthorized appearance.

(a) **During his pends.** 1. **By the client.**—If an attorney undertakes to appear in a case, without authority from the party whom he professes to represent, his act is an abuse of the privileges granted to him by the court, which it will investigate and correct, upon the application of the alleged client.⁶³ But although the client may thus make his application to the court for relief, it is not in all cases of assumed authority that the court will grant it. For if the party has himself been guilty of laches, and has permitted the attorney to act, without authority, for him, when he had notice that he was so acting, or had knowledge of such facts as would put him on inquiry, he may thus deprive himself of the right to deny the attorney's authority.⁶⁴ Such cases rest on the ground of estoppel. A party cannot sleep upon his rights, or intrust his business to attorneys, and without the least show of diligence, come in years after the time at which he could have availed himself of the advantage the law gave him, and on that, set aside a judgment or decree of a court of competent jurisdiction.⁶⁵

—2. **By the adverse party.** Not only may the authority of the attorney to appear in a case be called into question by his alleged client, but also by the adverse party in a proper case. If he has reasonable grounds to believe that the attorney is not acting under proper authority, he may make a motion to the court to require him to produce it. But before the court will grant such motion, and require the attorney of his adversary to produce his authority, he must show that the attorney does not in fact possess the authority he assumes, and that his rights will be jeopardized by being brought into

⁶³ *Clark v. Willett*, 35 Cal. 534; *People v. Mariposa*, 39 Cal. 683.

⁶⁴ *Jones v. Williamson*, 5 Cold. (Tenn.) 377; *Harshey v. Blackmarr*, 20 Iowa, 161, 89 Am. Dec. 520; *Bryant v. Williams*, 21 Iowa, 329; *Macomber v. Peck*, 39 Iowa, 351; *Seale v. McLaughlin*, 28 Cal. 668.

⁶⁵ *Jones v. Williamson*, 5 Cold. (Tenn.) 377.

litigation, without the consent of the man who stands on the record as his adversary. The court will not proceed upon light grounds or mere suspicions. If, however, the party does show such facts and raises a reasonable presumption that the attorney does not possess the assumed authority from his supposed client, or shows that the justice of the case requires it, the court will require the attorney to show his authority.⁶⁶ And it is the duty of the court to require the attorney to show his authority, where it is questioned, not capriciously, but upon evidently good grounds.⁶⁷ Objection to the opposing attorney's authority should be made at the earliest possible opportunity, and as a general rule, at least, should be made by motion before the trial, and is not a question to be disposed of at the trial.⁶⁸

As was said in a Delaware case: "In our practice, therefore, the court would expect some grounds to be laid by affidavit or otherwise, before they would, at the instance of the defendants, require the plaintiff's attorney to produce a written warrant, or other proof of his authority. Doubtless

⁶⁶ *Tally v. Reynolds*, 1 Ark. 99, 31 Am. Dec. 737; *People v. Mari-
posa County*, 39 Cal. 683; *Hunter v. Bryant*, 98 Cal. 248; *State Use
of West v. Houston*, 3 Har. (Del.) 15; *Spencer v. Bailey*, 1 Hawaii,
205; *Leslie v. Fischer*, 62 Ill. 118; *Bell v. Farwell*, 89 Ill. App. 638;
State v. Tilghman, 6 Iowa, 496; *McAlexander v. Wright*, 3 T. B.
Mon. (Ky.) 189, 16 Am. Dec. 93; *Belt v. Wilson's Adm'r*, 6 J. J.
Marsh. (Ky.) 495, 22 Am. Dec. 88; *O'Flynn v. Eagle*, 7 Mich. 306;
McKlernan v. Patrick, 5 How. (Miss.) 333; *Keith v. Wilson*, 6 Mo.
435, 35 Am. Dec. 443; *Manchester Bank v. Fellows*, 28 N. H. 302;
Hamilton v. Wright, 37 N. Y. 502; *Ninety-nine Plaintiffs v. Vander-
bilt*, 1 Abb. Pr. (N. Y.) 193, 4 Duer, 632; *Reece v. Reece*, 66 N. C.
377; *Allen v. Green*, 1 Bailey (S. C.) 448; *Hellman v. McWhennie*,
3 Rich. Law (S. C.) 364; *Jones v. Williamson*, 5 Cold. (Tenn.) 379;
Ex parte Gillespie, 3 Yerg. (Tenn.) 325.

"A lawyer prosecuting a suit should be required to produce satisfactory evidence of his authority to do it in every case, when there is reasonable ground to apprehend that he is proceeding without permission of the individual who stands on the record as plaintiff, and in case of his failure to produce such evidence the suit should be dismissed by the court." *Low v. Settle*, 22 W. Va. 392.

⁶⁷ *Colorado Coal & Iron Co. v. Carpita*, 6 Colo. App. 248.

⁶⁸ *People v. Lamb*, 85 Hun (N. Y.) 171; *Clark v. Fitch*, 2 Wend. 464; *Indiana B. & W. R. Co. v. Maddy*, 103 Ind. 200.

where fraud was suggested, and especially if a minor was concerned and in danger of being injured by an unauthorized proceeding before us, we would, for the protection of either guardian, ward, or defendant, inquire into the attorney's authority; and would, if the case required it, apply other remedy than the mere striking of the suit."⁶⁹ But the attorney need not show his authority on a mere demand;⁷⁰ nor can he be called on to produce it without previous notice.⁷¹

"The right of the court to compel an attorney of the court to exhibit his authority to sue, arises from the control which it exercises over all its process and proceedings, and over its officers in order to prevent abuse. It arises from no statute, but emanates from the breast of the court, and from its desire to cause justice between the parties."⁷²

(b) In subsequent proceedings. 1. On a domestic judgment.—The authorities do not all agree as to the effect of the attorney's unauthorized appearance, in an action on the judgment obtained through such appearance, where the judgment is a domestic one. Many of the decisions hold that where the attorney's authority is sought to be impeached in a collateral proceeding on the judgment or on appeal, the presumption that the appearance of the attorney was authorized by the litigant is not merely *prima facie*, but is conclusive, and the party whom the attorney professed to represent will not be permitted to prove that he never authorized the attorney to appear for him.⁷³ Thus in an action of debt on a judgment, a plaintiff is bound by a judgment for costs rendered against him in an action brought in his name by an

⁶⁹ *State v. Houston*, 3 Har. (Del.) 15, 20.

⁷⁰ *Norberg v. Heineman*, 59 Mich. 210.

⁷¹ *Beckley v. Newcomb*, 24 N. H. 359; *Holder v. State* (Tex. Cr. App.) 29 S. W. 793.

⁷² *Ninety-nine Plaintiffs v. Vanderbilt*, 1 Abb. Pr. (N. Y.) 196.

⁷³ *Bonnifield v. Thorp*, 71 Fed. 924; *Finneran v. Leonard*, 7 Allen (Mass.) 54, 83 Am. Dec. 665; *Young v. Watson*, 155 Mass. 77; *Corbitt v. Timmerman*, 95 Mich. 581, 35 Am. St. Rep. 586; *Bunton v. Lyford*, 37 N. H. 512, 75 Am. Dec. 144; *Brown v. Nichols*, 42 N. Y. 26; *Washbon v. Cope*, 144 N. Y. 287; *Pillsbury v. Dugan's Adm'r*, 9 Ohio, 117, 34 Am. Dec. 427; *Town of St. Albans v. Bush*, 4 Vt. 58, 23 Am. Dec. 246; *Abbott v. Dutton*, 44 Vt. 546, 8 Am. Rep. 394.

attorney, without his knowledge or consent.⁷⁴ But this rule is inapplicable in a case where the defendant in the judgment was a nonresident of the state during the pendency of the proceedings and was not within the jurisdiction.⁷⁵

Other decisions, however, tend towards holding that a judgment rendered upon the unauthorized appearance of the attorney is invalid, and the person against whom such judgment is rendered may question its validity, either in a direct or collateral proceeding.⁷⁶ Thus, it has been held that a domestic judgment may be impeached collaterally by the defendant, by proof that he was not served with process and did not appear, although the record recites that he was served, and contains a forged appearance by attorney on his behalf.⁷⁷ This doctrine is based upon the principle that as the attorney's appearance was unauthorized, there was no appearance of the party, and consequently, the court had no jurisdiction of the latter's person, and not having jurisdiction its judgment was voidable. Thus where, in an action by attachment, there was no service of summons or publication of notice on the defendant, an appearance by an attorney at law, of his own motion and without authority, in the name of the defendant, cannot confer jurisdiction over the person of the defendant.⁷⁸ So the court will strike off a judgment when

⁷⁴ *Town of St. Albans v. Bush*, 4 Vt. 58, 23 Am. Dec. 246.

⁷⁵ *Vilas v. Plattsburgh & M. R. Co.*, 123 N. Y. 440, 20 Am. St. Rep. 771; *Mastin v. Gray*, 19 Kan. 458, 27 Am. Rep. 149.

⁷⁶ *Robson v. Eaton*, 1 Term R. 62; *Bayley v. Buckland*, 1 Exch. 1, 16 Law J. Exch. 204; *Reynolds v. Howell*, L. R. 8 Q. B. 398; *Merced County v. Hicks*, 67 Cal. 108; *Williams v. Neth*, 4 Dak. 360; *Anderson v. Hawhe*, 115 Ill. 33; *White v. Jones*, 38 Ill. 163; *Sherard v. Nevius*, 2 Ind. 241, 52 Am. Dec. 508; *Macomber v. Peck*, 39 Iowa, 351; *Powell v. Spaulding*, 3 G. Greene (Iowa) 443; *Harshey v. Blackmar*, 20 Iowa, 161, 89 Am. Dec. 520; *Reynolds v. Fleming*, 30 Kan. 106, 46 Am. Rep. 86; *Brinkman v. Shaffer*, 23 Kan. 528; *Christie v. Garrity*, 14 Ky. L. R. 910, 22 S. W. 158; *Walworth v. Henderson*, 9 La. Ann. 339; *Decuir v. Lejeune*, 15 La. Ann. 569; *McNamara v. Carr*, 84 Me. 299; *Stocking v. Hanson*, 35 Minn. 207; *Keith v. Wilson*, 6 Mo. 435, 35 Am. Dec. 443; *Kepley v. Irwin*, 14 Neb. 300; *Kirschbaum v. Scott*, 35 Neb. 199; *Bryn Mawr Nat. Bank v. James*, 152 Pa. 364.

⁷⁷ *Ferguson v. Crawford*, 70 N. Y. 253, 26 Am. Rep. 589.

⁷⁸ *Anderson v. Hawhe*, 115 Ill. 33.

the affidavit of the defendant states that she had no knowledge that a suit had been brought against her until execution was issued upon the judgment; that the attorney who accepted service of the writ and statement was not her attorney; that she had never consulted him professionally in respect to the said suit, and that he had no authority from her to accept service as her attorney of such writ and statement.⁷⁹ If damages are sustained by the defendant, by reason of the judgment rendered against him through the unauthorized appearance of the attorney, the party may have his remedy by a civil action against the attorney.⁸⁰

In some cases it has been held that such a judgment will not be set aside, if the attorney is an able and responsible person,⁸¹ or if the adverse party has acquired rights.⁸²

⁷⁹ *Bryn Mawr Nat. Bank v. James*, 152 Pa. 364.

⁸⁰ *Anon.*, 1 Salk. 86; *Anon.*, 6 Mod. 14; *Field v. Gibbs*, Pet. C. C. 155, Fed. Cas. No. 4,766; *Marvel v. Manouvrier*, 14 La. Ann. 3, 74 Am. Dec. 425; *Dorsey v. Kyle*, 30 Md. 512, 96 Am. Dec. 617; *Munnikuyson's Adm'x v. Dorsett's Adm'x*, 2 Har. & G. (Md.) 378; *Schirling v. Scites*, 41 Miss. 644; *Bunton v. Lyford*, 37 N. H. 512, 75 Am. Dec. 144; *Everett v. Warner Bank*, 58 N. H. 340; *Bogardus v. Livingston*, 2 Hilt. (N. Y.) 236; *Hoffmire v. Hoffmire*, 3 Edw. Ch. (N. Y.) 173; *Jackson v. Stewart*, 6 Johns. (N. Y.) 34; *American Ins. Co. v. Oakley*, 9 Paige (N. Y.) 496, 38 Am. Dec. 561; *Cyphert v. McClune*, 22 Pa. 195.

⁸¹ *Anon.*, 1 Salk. 88; *Anon.*, 6 Mod. 16; *Bayley v. Buckland*, 1 Exch. 1, 16 Law J. Exch. 204; *Munnikuyson's Adm'x v. Dorsett's Adm'x*, 2 Har. & G. (Md.) 378; *Denton v. Noyes*, 6 Johns. (N. Y.) 298, 5 Am. Dec. 237; *Allen v. Stone*, 10 Barb. (N. Y.) 547; *American Ins. Co. v. Oakley*, 9 Paige (N. Y.) 496, 38 Am. Dec. 561; *Campbell v. Bristol*, 19 Wend. (N. Y.) 101; *University of N. C. v. Lassiter*, 83 N. C. 38.

In *Hamilton v. Wright*, 37 N. Y. 502, the court says: "When an appearance is entered by an attorney without authority, the inquiry, whether such attorney is of sufficient responsibility to answer for his unauthorized conduct to the party injured thereby, is entertained. And it may be proper always to inquire whether the injury to the party is irremediable unless such appearance be set aside, and the proceedings founded thereon vacated. In exercise of their general equitable control over their own judgments, the court may and should consider whether they can relieve the party for whom an unauthorized appearance is made, without undue prejudice to the party who has in good faith relied upon such appearance and the official character of the attorney who appears. But it would be at

Thus, where rights have been acquired by one who had no notice of the lack of authority on the part of an attorney who professed to represent the owners in a proceeding for the sale of land, no evidence tending to disprove the existence of such authority ought to be admitted to overthrow the rights so acquired.⁸³ But a judgment rendered upon an unauthorized appearance of an attorney will be absolutely vacated and set aside, where the attorney is insolvent at the time the application for relief is made, although he may not have been insolvent when the judgment was rendered, provided the application is made before the rights of the party procuring the judgment have changed to his prejudice.⁸⁴ If the adverse party has acquired no rights in the case, the court may, upon the application of the supposed client, correct the proceedings and compel the attorney to pay the costs.⁸⁵ It will be seen, however, by reference to these cases, that the prevailing opinion is that, on principle, the responsibility or solvency of the attorney really has nothing to do with the question, and that no party not guilty of negligence

variance with the scheme and plan upon which we universally administer the law, if a defendant could be prosecuted by a responsible attorney, in full authority to practice in our courts, and after having successfully and in good faith defended, as the case might be, through all the tribunals of justice, and to final judgment in the court of last resort, be required to submit to an order setting aside the proceedings, and be left to be again prosecuted for the same cause of action, on the mere ground that the plaintiff's attorney had no authority from the plaintiff to bring the action. The law which gives to attorneys their commissions, must be deemed to guarantee to defendants protection against such a result."

⁸² *Williams v. Johnson*, 112 N. C. 424; *American Ins. Co. v. Oakley*, 9 Paige (N. Y.) 496, 38 Am. Dec. 561.

⁸³ *Williams v. Johnson*, 112 N. C. 424.

⁸⁴ *Vilas v. Plattsburgh & M. R. Co.*, 123 N. Y. 440, 20 Am. St. Rep. 771; *Campbell v. Bristol*, 19 Wend. (N. Y.) 101; *Smyth v. Balch*, 40 N. H. 363 (the court will grant a perpetual injunction from enforcing the judgment where the attorney is poor and irresponsible); *Anon.*, 6 Mod. 16; *Bayley v. Buckland*, 1 Exch. 1, 16 Law J. Exch. 204.

⁸⁵ *American Ins. Co. v. Oakley*, 9 Paige (N. Y.) 496, 38 Am. Dec. 561; *French v. French*, 4 Law Rec. (N. S.; Irish) 123.

be bound by the act of another, which was wholly and
sedly unauthorized.⁸⁶

The better rule, in the United States, now seems to be that
a judgment is rendered against a party upon the unau-
thorized appearance of an attorney, he may be relieved there-
from irrespective of the question whether the attorney is
admissible or not, by a prompt and proper application to
the court or by bill in equity; and the presumption of au-
thority may be contradicted by extrinsic as well as intrinsic
evidence.⁸⁷

- 2. On a foreign judgment. In the case of foreign
judgments, however, recovered in other states through the
unauthorized appearance of an attorney, it is a well settled
rule that in an action brought upon them the defendant may
show that he was not served with process, and that the attor-
ney who entered the appearance for him had no authority to
do so; and consequently the court had no jurisdiction over
the case. And this rule is true, notwithstanding any recitals

Harshey v. Blackmarr, 20 Iowa, 161, 89 Am. Dec. 520, 527.
Shelton v. Tiffin, 6 How. (U. S.) 163; *Truett v. Wainwright*, 9
Ind. 628; *Harshey v. Blackmarr*, 20 Iowa,
Am. Dec. 520; *Bryant v. Williams*, 21 Iowa, 331; *Newcomb*
v. Marvel, 27 Iowa, 390; *Marvel v. Manouvrier*, 14 La. Ann. 3, 74
Am. Dec. 424; *Ridge v. Alter*, 14 La. Ann. 866; *Hess v. Cole*, 23 N.
J. 116; *Price v. Ward*, 25 N. J. Law, 225; *McKelway v. Jones*,
N. J. Law, 345; *Porter v. Bronson*, 19 Abb. Pr. (N. Y.) 236, 29
Am. Pr. 292; *Yates v. Horanson*, 7 Rob. (N. Y.) 12; *Rogers v.*
Ellsworth, 31 Barb. (N. Y.) 304; *Ellsworth v. Campbell*, 31 Barb. (N.
Y.) 4; *Critchfield v. Porter*, 3 Ohio, 518; *Abernathy v. Jenkins*,
10 Mo., 286; *Jones v. Williamson*, 5 Cold. (Tenn.) 371; *Boro v. Har-*
Lea (Tenn.) 36.

Arcy v. Ketchum, 11 How. (U. S.) 165; *Harris v. Hardeman*,
10 How. (U. S.) 334; *Shelton v. Tiffin*, 6 How. (U. S.) 164; *Kings-*
ley v. Yniestra, 59 Ala. 320; *Eaton v. Pennywit*, 25 Ark. 144; *Al-*
bin Kinney, 4 Conn. 380, 10 Am. Dec. 151; *Thompson v. Emmert*,
11 Ill. 415; *Welch v. Sykes*, 8 Ill. 197, 44 Am. Dec. 689; *Sherrard v.*
Ellsworth, 2 Ind. 241, 52 Am. Dec. 508; *Harshey v. Blackmarr*, 20
Iowa, 161, 89 Am. Dec. 520; *Baltzell v. Nosler*, 1 Iowa, 588, 63 Am.
Dec. 56; *Latterett v. Cook*, 1 Iowa, 1, 63 Am. Dec. 428; *Hindman*
v. Hall, 3 G. Greene (Iowa) 170; *Whetstone v. Whetstone*, 31
Iowa, 281; *Miller v. Gaskins*, 3 Rob. (La.) 94; *Phelps v. Brewer*,
1 Mass. (Mass.) 390, 57 Am. Dec. 56; *Carleton v. Bickford*, 13

in the judgment record to the contrary.⁸⁹ When an action is brought against a person on a foreign judgment and he wishes to defend by showing that the court had no jurisdiction of his person, he may do so by showing that he had no legal notice of the suit, and that he had authorized no one to appear in his name. The mere fact that there was a recital in the judgment record that the party "came in" or "executed" or a similar recital does not show conclusively that he had legal notice, or that the attorney's appearance was authorized.⁹⁰ This rule is not in conflict with article IV, § 1, of the constitution of the United States, which provides that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state," because this provision refers only to such records, when the court had jurisdiction over the parties; but in these cases, as the attorney appeared without authority, the cause was not properly within the jurisdiction of the court.⁹¹

Gray (Mass.) 591, 74 Am. Dec. 652; *Finneran v. Leonard*, 7 Allen (Mass.) 54, 83 Am. Dec. 665; *Wright v. Andrews*, 130 Mass. 149; *Napton v. Leaton*, 71 Mo. 358; *Price v. Ward*, 25 N. J. Law, 225; *Hess v. Cole*, 23 N. J. Law, 116; *Kerr v. Kerr*, 41 N. Y. 275; *Long v. Long*, 1 Hill (N. Y.) 599; *Gardner v. Tyler*, 16 Abb. Pr. (N. Y.) 22, 25 How. Pr. 220; *Norwood v. Cobb*, 24 Tex. 551; *Chunn v. Gray*, 51 Tex. 112; *Newcomb v. Peck*, 17 Vt. 302, 44 Am. Dec. 340; *Wilson v. Bank of Mt. Pleasant*, 6 Leigh (Va.) 570; *Rape v. Heaton*, 9 Wis. 328, 76 Am. Dec. 269.

⁸⁹ *Arnott v. Webb*, 1 Dill. 362, Fed. Cas. No. 562; *Dozier v. Richardson*, 25 Ga. 90; *Lawrence v. Jarvis*, 32 Ill. 304; *Gilman v. Gilman*, 126 Mass. 26, 30 Am. Rep. 646; *Wright v. Andrews*, 130 Mass. 149; *Hall v. Williams*, 6 Pick. (Mass.) 232, 17 Am. Dec. 356; *Price v. Ward*, 25 N. J. Law, 225; *Hess v. Cole*, 23 N. J. Law, 116; *Starbuck v. Murray*, 5 Wend. (N. Y.) 148, 21 Am. Dec. 172; *Chapman v. Austin*, 44 Tex. 133; *Rape v. Heaton*, 9 Wis. 328, 76 Am. Dec. 269.

⁹⁰ *Pollard v. Baldwin*, 22 Iowa, 328 ("duly served"); *Gleason v. Dodd*, 4 Metc. (Mass.) 333; *Watson v. New England Bank*, 4 Metc. (Mass.) 343; *Marx v. Fore*, 51 Mo. 69, 11 Am. Rep. 432; *Starbuck v. Murray*, 5 Wend. (N. Y.) 148, 21 Am. Dec. 172; *Hoffman v. Hoffman*, 46 N. Y. 30, 7 Am. Rep. 299; *Noyes v. Butler*, 6 Barb. (N. Y.) 613; *Pennywit v. Foote*, 27 Ohio St. 600, 22 Am. Rep. 340; *Chunn v. Gray*, 51 Tex. 112; *Norwood v. Cobb*, 24 Tex. 551 (return "executed"); *Easley v. McClinton*, 33 Tex. 288 ("executed").

⁹¹ *Gilman v. Gilman*, 126 Mass. 26, 30 Am. Rep. 646; *Pennywit*

will be seen that a distinction is made between domestic and foreign judgments obtained by the unauthorized appearance of the attorney. The only apparent reason for this distinction is, that "in the case of a foreign judgment it is reasonable, or at least unreasonable, to require the defendant to go to the state which rendered it and attack it directly by motion or bill;" therefore he is permitted to plead the want of authority in the attorney, in a collateral as well as a direct proceeding. "Whereas in the case of a domestic judgment it may be deemed better to force the party to assail it directly, * * * by prohibiting him from resorting to the want of authority in the attorney, collaterally," as a defense to an action on the judgment.⁹²

Judgment through fraud. But, where a judgment, whether foreign or domestic, is rendered against a party upon his unauthorized appearance through fraud or collusion between the plaintiff's attorney and the attorney for the defendant or other party interested, or by the attorney alone, a writ in equity will be granted to the defendant, if he seeks relief promptly and properly, and has not been guilty of fraud.⁹³

note, 27 Ohio St. 600, 22 Am. Rep. 340, note; *Thompson v. Man*, 18 Wall. (U. S.) 457; *Knowles v. Gaslight & C. Co.*, 19 (U. S.) 58; *Mills v. Duryee*, 7 Cranch (U. S.) 481; *D'Arcy v. Schum*, 11 How. (U. S.) 165.

Washburn v. Blackmarr, 20 Iowa, 161, 89 Am. Dec. 523. And as said in *Finneran v. Leonard*, 7 Allen (Mass.) 54, 83 Am. Dec. 66: "The strong reason for permitting judgments rendered in foreign states to be impeached for want of jurisdiction of the courts, was the necessity of such a rule of law, as the only effectual way to protect our citizens from the effect of judgments improperly rendered against them by courts having no jurisdiction over them. But in the case of our domestic judgments between our own citizens, if such judgment has been obtained improperly, for want of service or of authority to appear, or other defect, the remedy is at hand, and the party aggrieved may obtain relief in our own courts, by proper application for review, or by writ of error, or in a proper case by bill in equity, and a stay of proceedings may be had until such claim for relief has been duly considered and adjudicated upon."

Washburn v. Blackmarr, 20 Iowa, 161, 89 Am. Dec. 520; *De Louis v. McK*, 2 G. Greene (Iowa) 55, 50 Am. Dec. 491; *Baker v. O'Riordan*, C. & S.—88.

§ 637. What evidence required to rebut.

Where a party questions an attorney's authority to appear, he must usually show, by affidavit, facts sufficient to raise a reasonable presumption that the attorney is acting without authority, or to rebut the presumption that he is authorized.⁹⁴ But the affidavit of an attorney which states that he is informed and believes that the attorney who represents the opposite party is not authorized to appear is insufficient to show the want of authority in the opposing attorney.⁹⁵ So his authority cannot be impugned by mere suggestion.⁹⁶ The burden of proof of showing such lack of authority is on the party that denies the authority, and he must establish his allegations by positive proof.⁹⁷ Whether or not an attor-

dan, 65 Cal. 368; *Dorsey v. Kyle*, 20 Md. 512, 96 Am. Dec. 617; *Kelso v. Stigar*, 75 Md. 378; *Burton v. Lyford*, 37 N. H. 512, 75 Am. Dec. 144; *Denton v. Noyes*, 6 Johns. (N. Y.) 298, 5 Am. Dec. 237; *Jones v. Williamson*, 5 Cold. (Tenn.) 371.

⁹⁴ *Tally v. Reynolds*, 1 Ark. 99, 31 Am. Dec. 737; *Cartwell v. Menifee*, 2 Ark. 356; *Turner v. Caruthers*, 17 Cal. 432; *Dillon v. Rand*, 15 Colo. 372; *State v. Houston*, 3 Har. (Del.) 15, 20; *Williams v. Butler*, 35 Ill. 545; *Bell v. Farwell*, 89 Ill. App. 638; *New Orleans v. Steinhardt*, 52 La. Ann. 1043; *Bender v. McDowell*, 46 La. Ann. 393; *Postal Telegraphic Cable Co. v. Louisville, N. O. & T. R. Co.*, 43 La. Ann. 522; *Dockham v. Potter*, 27 La. Ann. 73; *Hollins v. St. Louis & C. R. Co.*, 57 Hun (N. Y.) 139; *Bryn Mawr Nat. Bank v. James*, 152 Pa. 364; *Danville, H. & W. B. R. Co. v. Rhodes*, 180 Pa. 157. Under Georgia Civ. Code, § 4423, it is held that the presumption of an attorney's authority to appear can be overcome only as provided by that statute. *Planters' & People's M. Fire Ass'n v. De Loach*, 113 Ga. 802.

⁹⁵ *People v. Mariposa Co.*, 39 Cal. 683; *Valle v. Picton*, 91 Mo. 207; *Robinson v. Robinson*, 32 Mo. App. 88. See *Famous Mfg. Co. v. Wilcox*, 180 Ill. 246.

⁹⁶ *Campbell v. Arcenaux*, 3 La. Ann. 558; *Turner v. Caruthers*, 17 Cal. 431; *Williams v. Uncompahgre Canal Co.*, 13 Colo. 469, 475; *Connell v. Galligher*, 36 Neb. 749; *State v. Passaic County Agricultural Soc.*, 54 N. J. Law, 260.

⁹⁷ *Bonnifield v. Thorp*, 71 Fed. 924; *Stubbs v. Leavitt*, 30 Ala. 352; *Garrison v. McGowan*, 48 Cal. 600; *Esley v. People*, 23 Kan. 510; *Mutual L. Ins. Co. v. Pinner*, 43 N. J. Eq. 52; *Dey v. Hathaway Printing Telegraph & Tel. Co.*, 41 N. J. Eq. 419; *Holder v. State*, 35 Tex. Cr. R. 19; *Schlitz v. Meyer*, 61 Wis. 418; *Thomas v. Steele*, 22 Wis. 207. But see *Brooks v. Kearns*, 86 Ill. 547, where

authority to appear in a case is a question to be determined by the jury from all the facts of the case, or if there is no jury by the court alone.⁹⁸

How relief obtained.

In the absence of special circumstances necessitating a reversal by a court of equity, relief from a judgment rendered, or a judgment not to be rendered, against a party, upon the unauthorized appearance of an attorney in his name, is to be sought by direct application to the court by motion in the action in which the unauthorized appearance was entered;⁹⁹ or the presumption that the attorney who appeared was authorized may be rebutted in any direct proceeding to attack the judgment based on such appearance, by showing that no notice was served in the action, and that the attorney appeared without the consent or knowledge of the one whom he was supposed to represent.¹⁰⁰ It is held, however, that the

burden of proving authority was on the person alleging it; *Stewart v. Stewart*, 56 How. Pr. (N. Y.) 256; *Dangerfield's Ex'r v. Dangerfield's Heirs*, 8 Mart. (N. S.; La.) 119.

Paugh v. Jones, 64 N. C. 29; *Howard v. Smith*, 33 N. Y. Ct. 124; *Clark v. Holliday*, 9 Mo. 711; *Henderson v. Terry*, 281.

Reynolds v. Howell, L. R. 8 Q. B. 398; *Bonnifield v. Thorp*, 1924; *Hill v. Mendenhall*, 21 Wall. (U. S.) 453 (by special agreement equivalent); *Cartwell v. Menifee*, 2 Ark. 356; *Turner v. Turner*, 17 Cal. 432; *Dillon v. Rand*, 15 Colo. 372; *Williams v. Mahgre Canal Co.*, 13 Colo. 469; *Du Bois v. Clark*, 12 Colo. 10; *Lester v. McIntosh*, 101 Ga. 675; *Mix v. People*, 116 Ill. 40; *Beardsley v. Beardsley*, 108 Iowa, 396; *First Nat. Bank of Newton v. Grimes Dry Goods Co.*, 45 Kan. 510; *Reynolds v. Flemming*, Kan. 106, 46 Am. Rep. 86; *Howe v. Anderson* (Ky.) 14 S. W. 2d 100; *Arno v. Wayne Circuit Judge*, 42 Mich. 362; *Vilas v. Plattsmouth*, 123 N. Y. 440, 20 Am. St. Rep. 771; *Ferguson v. Ford*, 70 N. Y. 256, 26 Am. Rep. 589; *American Ins. Co. v. Paige* (N. Y.) 496, 38 Am. Dec. 561; *Denton v. Noyes*, 6 (N. Y.) 297, 5 Am. Dec. 237; *Hellman v. McWhennie*, 3 Haw. (S. C.) 364; *Abbott v. Dutton*, 44 Vt. 546, 8 Am. Rep.

East West Min. Co. v. Woodmas of A. Min. Co., 12 Colo. Am. St. Rep. 204; *Winters v. Means*, 25 Neb. 241, 13 Am. 489.

attorney's authority cannot be questioned for the first time on appeal or by writ of error;¹⁰¹ nor by *audita querela*.¹⁰²

But under special circumstances, "where the question of the unauthorized appearance is complicated with fraud, or the rights of purchasers or the circumstances are such that the court can see that the right to or measure of relief cannot properly be determined on motion, having regard to all interests affected, resort may be had to a bill in equity."¹⁰³ And in order for a party to have a judgment set aside in equity, for lack of notice or want of authority in the attorney to appear, he must show that he will suffer some injury by reason of the judgment if allowed to stand, and that he has resorted to his legal remedy, a motion to set aside the judgment in the court in which it was rendered.¹⁰⁴

§ 639. Sufficiency of proof of authority to appear.

When an attorney's authority to appear is questioned, and proof thereof called for, the mere declaration or statement by the attorney that he was employed by the party to represent him, or by his agent, whom he believed to be duly authorized, or that he represents the party, will ordinarily be deemed sufficient proof of such authority.¹⁰⁵ Where an

¹⁰¹ *Cockran v. Leister*, 2 Root (Conn.) 348; *Williams v. Butler*, 35 Ill. 545; *State v. Carothers*, 1 G. Greene (Iowa) 464; *Hefferman v. Burt*, 7 Iowa, 320, 71 Am. Dec. 445; *Noble v. Bank of Ky.*, 3 A. K. Marsh. (Ky.) 263; *Talbot v. McGee*, 4 T. B. Mon. (Ky.) 377; *Clark v. Holliday*, 9 Mo. 711; *Dunman v. Hartwell*, 9 Tex. 495, 60 Am. Dec. 176; *Shroudenbeck v. Phoenix F. Ins. Co.*, 15 Wis. 632. But see *Abbott v. Dutton*, 44 Vt. 546, 8 Am. Rep. 394.

¹⁰² *Spaulding v. Swift*, 18 Vt. 214; *Abbott v. Dutton*, 44 Vt. 546, 8 Am. Rep. 394.

¹⁰³ *Vilas v. Plattsburgh & M. R. Co.*, 123 N. Y. 440, 20 Am. St. Rep. 773; *Shelton v. Tiffin*, 6 How. (U. S.) 163; *Wiley v. Pratt*, 23 Ind. 628; *Harshey v. Blackmarr*, 20 Iowa, 161, 89 Am. Dec. 520; *Gifford v. Thorn*, 9 N. J. Eq. 702; *Boro v. Harris*, 13 Lea (Tenn.) 43; *Coles v. Anderson*, 8 Humph. (Tenn.) 489.

¹⁰⁴ *Piggott v. Addicks*, 3 G. Greene (Iowa) 427, 56 Am. Dec. 547.

¹⁰⁵ *Daughdrill v. Daughdrill*, 108 Ala. 321 (statute provides that oath of attorney is presumptive evidence of authority); *Mobile Transp. Co. v. Mobile*, 128 Ala. 335, 86 Am. St. Rep. 143; *Bridgton v. Bennett*, 23 Me. 420; *Penobscot Boom Corp. v. Lamson*, 16 Me. 224, 33 Am. Dec. 656; *Steffe v. Old Colony R. Co.*, 156 Mass. 262;

ey, who is ruled to produce his authority to bring a
 files the affidavit of the plaintiff's agent that he was
 d by the plaintiff to cause the suit to be brought, and
 e employed said attorney in pursuance of such direc-
 the showing of authority is sufficient.¹⁰⁶ So letters
 clients, or the clients' agent, residing at a distance, to
 attorney purporting to employ him in a legal matter
 ld to be sufficient proof of his authority;¹⁰⁷ or any
 written recognition of the attorney's authority is held,
 the statute, to be presumptive evidence of such author-
 the time the suit was brought.¹⁰⁸ But the mere pos-
 of a bond or other negotiable paper does not authorize
 osecution of a suit on it in the name of the obligee;¹⁰⁹
 n he prove his authority to appear by producing a let-
 m a third person asking him to appear.¹¹⁰

ster Bank v. Fellows, 28 N. H. 302; Folly v. Smith, 12 N.
 139; Andrews v. Harrington, 19 Barb. (N. Y.) 343; Caniff
 rs, 15 Johns. (N. Y.) 246; Lindhelm v. Manhattan R. Co.,
 (N. Y.) 122 (compare Stephani v. Stephani, 75 Hun [N.
). But see Bigler v. Toy, 68 Iowa, 687.

ughes v. Osborn, 42 Ind. 450; Famous Mfg. Co. v. Wilcox,
 246.

ckman v. Troll, 29 Minn. 124; Holden v. Greve, 41 Minn.
 r v. Brown, 69 Fed. 216; Bush v. Miller, 13 Barb. (N. Y.)
 con v. Smith, 1 Brev. (S. C.) 426; Rogers v. Rebecca Park's
 , 4 Humph. (Tenn.) 480; Grignon v. Schmitz, 18 Wis. 620.
 r from attorneys of another place, enclosing note, and in-
 g him to secure or put in process of collection is sufficient.
 v. Savery, 8 Iowa, 217.

ardin v. Ho-yo-po-nubby's Lessee, 27 Miss. 579, the court
 "Suits are frequently instituted by attorneys under the au-
 of letters from their clients, who are strangers, and whose
 iting is unknown to them, and could not be proved with-
 at trouble and delay. If required in such a case to produce
 hority, the production of the letter, though he might be
 to prove the handwriting, would be sufficient; and so of a
 written by a party purporting to be the agent of the plain-
 ll that is required to be shown in such cases in the first
 e, is, that the attorney has acted in good faith and under
 ority appearing to be genuine, though informal."

rean v. Lloyd, 128 Ill. 493.

lt v. Wilson's Adm'r, 6 J. J. Marsh. (Ky.) 495, 22 Am. Dec.

estbrook v. Blood, 50 Mich. 443.

Satisfactory evidence of such authority may also be furnished by acts as well as by declarations or written evidence. Thus the authority of an attorney, who has been employed by a director or other analogous officer of a corporation, to appear for it, without any specific vote therefor, and who has been paid for his service by the corporation, is sufficiently proved.¹¹¹ So the employment of an attorney is proved sufficiently by his acting as such for the plaintiff and being recognized as acting in that capacity on the records of the courts.¹¹² Or although his original appearance was unauthorized, it may be shown that it was subsequently ratified by the client.¹¹³

III. IMPLIED POWERS OF AN ATTORNEY.

§ 640. General powers over a case.

(a) **As to remedy.**—As a general rule an attorney at law has, by virtue of his retainer as such, very large, if not absolute, power to do in behalf of his client all lawful acts, in or out of court, that are necessary or incidental to the prosecution and management of the case, which affect the remedy only, and not the cause of action.¹¹⁴ “To impose upon the attorney the necessity of consulting with his client whenever propositions are made to him with regard to these matters, which in his judgment are advantageous, would so embarrass and thwart him as in a great measure to destroy his usefulness;

¹¹¹ *Field v. Proprietors of Common & Undivided Land*, 1 Cush. (Mass.) 11.

¹¹² *Smallwood v. Norton*, 20 Me. 83, 37 Am. Dec. 39. See, also, *Neff v. Smyth*, 111 Ill. 100.

¹¹³ *Hughes County v. Ward*, 81 Fed. 314; *Roberts v. Denver, L. & G. R. Co.*, 8 Colo. App. 504.

¹¹⁴ *Rex v. Pinsoneault*, L. R. 6 P. C. 245; *McGeorge v. Bigstone Gap Imp. Co.*, 88 Fed. 599; *Crescent Canal Co. v. Montgomery*, 124 Cal. 134; *Coonan v. Loewenthal*, 129 Cal. 197; *Toy v. Haskell*, 128 Cal. 558, 79 Am. St. Rep. 70; *Benson v. Carr*, 73 Me. 76; *Moulton v. Bowker*, 115 Mass. 36, 15 Am. Rep. 72, *Huffcut*, Cas. 228; *Ratican v. Union Depot Co.*, 80 Mo. App. 528; *Welsh v. Cochran*, 63 N. Y. 181, 20 Am. Rep. 519; *Hamel v. Brooklyn Heights R. Co.*, 59 App. Div. (N. Y.) 135; *Garrett v. Hanshue* (Ohio) 42 N. E. 256; *Swartz v. Morgan*, 163 Pa. 195, 43 Am. St. Rep. 786; *Fox v. Wm. Deering & Co.*, 7 S. D. 443.

ce it is that the courts quite generally concede to the attorney unlimited authority over the conduct of the litigation, including the power to control all legal process, and to compromise or release all attachment or other liens which have accrued in the progress of the cause, as collateral thereto, not belonging to the original demand."¹¹⁵

Whatever the attorney does or omits to do in the conduct of litigation, as affects the remedy only, if it be not done fraudulently or collusively, is binding on the client, although it may result in an injury to him.¹¹⁶ And this includes power to employ all necessary and usual means for the accomplishment of the purpose for which he was employed,¹¹⁷ or to do all acts which the interest of his client may require,¹¹⁸ and within the scope of his authority.¹¹⁹ The attorney is the officer of the court, and the court holds him responsible for the due and orderly conduct of the case, and as long as

Levy v. Brown, 56 Miss. 89.

Nightingale v. Or. Cent. R. Co., 2 Sawy. 338, Fed. Cas. No. 4; Putnam v. Day, 22 Wall. (U. S.) 60; Terry v. Commercial Bank, 92 U. S. 454; Pierce v. Strickland, 2 Story, 292, Fed. Cas. No. 11,147; Scroggin v. Hammett Grocer Co., 66 Ark. 183; Coonan v. Jewenthal, 129 Cal. 197; Lee v. Grimes, 4 Colo. 185; De Louis v. Peek, 2 G. Greene (Iowa) 55, 50 Am. Dec. 491; Jenney v. Delescler, 20 Me. 183; Benson v. Carr, 73 Me. 76; Burgess v. Stevens, 1 Me. 559; Moulton v. Bowker, 115 Mass. 36, 15 Am. Rep. 72; Bond v. White, 109 Mass. 392; Lewis v. Sumner, 13 Metc. (Mass.) 269; Clinton v. Heagney, 175 Mass. 134; Foster v. Wiley, 1 Mich. 244, 15 Am. Rep. 185; Levy v. Brown, 56 Miss. 83; McCann v. McLennan, 3 Neb. 25; Edgerton v. Brackett, 11 N. H. 218; Howel v. Lawrence, 22 N. J. Law, 99; Beck v. Bellamy, 93 N. C. 129; Beer v. Huntsman (Tenn. Ch. App.) 49 S. W. 57; Clark v. Raney, 9 Wis. 135, 76 Am. Dec. 252.

Clark v. Randall, 9 Wis. 135, 76 Am. Dec. 252, note.

Pierce v. Strickland, 2 Story, 292, Fed. Cas. No. 11,147.

Painter v. Abel, 8 Law T. (N. S.) 287; Lawson v. Bettison, Ark. 401; Sampson v. Ohleyer, 22 Cal. 200; Stenzel v. Sims, 25 App. 538; Harvey v. Fink, 111 Ind. 249; Nave v. Baird, 12 Ind. 1; Fairbanks v. Stanley, 18 Me. 296; Rice v. Wilkins, 21 Me. 558; Mel v. Carmack, 2 Md. Ch. 143; Morgan v. Joyce, 66 N. H. 538; v. Green, 52 N. J. Eq. 1, 8; Russell v. Lane, 1 Barb. (N. Y.) 519; Nlee v. McDowell, 39 N. C. (4 Ired. Eq.) 481; Boing v. Randall & G. R. Co., 88 N. C. 62; Chambers v. Hodges, 23 Tex. 104; Ball Co. v. Payne, 9 Wyo. 441.

the attorney appears on record for the client, the latter has no right to control or interfere with him in the due and orderly conduct and management of his case.¹²⁰ And where amendments to a declaration are allowed by the court with the consent of defendant's attorney regularly employed in the action, the fact that the attorney has not yet entered his appearance of record is immaterial.¹²¹ An attorney of record may bind his client to a final disposition of an action by oral or written agreement entered on the record, made an order of court, and executed by the adversary in good faith, without knowledge of any limitation upon the

¹²⁰ *Crescent Canal Co. v. Montgomery*, 124 Cal. 135; *Wylie v. Sierra Gold Co.*, 120 Cal. 485; *Coonan v. Loewenthal*, 129 Cal. 197; *Mott v. Foster*, 45 Cal. 72. And the attorney's temporary absence from the county does not affect the rule. In *Commissioners v. Younger*, 29 Cal. 147, 87 Am. Dec. 164, the court says: "A party to an action may appear in his own proper person or by attorney, but he cannot do both. If he appears by attorney, he must be heard through him, and it is indispensable to the decorum of the court, and the due and orderly conduct of a cause, that such attorney shall have control of the action, and his acts go unquestioned by anyone except the party whom he represents. So long as he remains attorney of record, the court cannot recognize any other as having the management of the case. If the party, for any cause, becomes dissatisfied with his attorney, the law points out a remedy. He may move the court for leave to change his attorney, as provided in section 10 of the act concerning attorneys and counselors. Until that has been done, the client cannot assume control of the case. While there is an attorney of record, no stipulation as to the conduct or disposal of the action should be entertained by the court unless the same is signed or assented to by such attorney. * * * Such a rule is not only indispensable to the orderly conduct of the cause, but is likewise a safeguard to the client against the intrigues of his adversary." *Nightingale v. Or. Cent. R. Co.*, 2 Sawy. 338, Fed. Cas. No. 10,264; *Monson v. Hawley*, 30 Conn. 51, 79 Am. Dec. 233, 235; *McConnell v. Brown*, 40 Ind. 384; *Anon.*, 1 Wend. (N. Y.) 109; *Edgerton v. Brackett*, 11 N. H. 218; *Bonnifield v. Thorp*, 71 Fed. 924. But see *McBratney v. Rome*, 87 N. Y. 467, holding that where a client has stipulated in person for the discontinuance of an action, he cannot question its regularity, and cannot be heard to say that having appeared by attorney, he only was authorized to sign such a stipulation.

¹²¹ *Rothschild v. Knight*, 176 Mass. 48.

ney's authority;¹²² and the fact that he is attorney for infant, employed by the infant's next friend, makes no difference in his powers.¹²³

) **As to cause of action.**—But the attorney has not the power to do such acts or control such matters as may affect the client's rights or cause of action. He cannot do anything by which the client would lose his rights in a cause without full satisfaction therefor. The reason for this distinction between the attorney's power over the remedy and over the cause of action is obvious. "The owner of the claim must always be the proper judge of its value, and the terms upon which he is willing to extinguish it, or to release any of the securities by which it was protected when he placed it in the hands of the attorney; and the latter, therefore, must consult him before taking any step which is likely to produce these results. But the client cannot know as well as his lawyer the steps necessary to insure its collection, or estimate so accurately the value of the legal securities, which may be evolved in the course of the litigation. It is because of his ignorance of these matters that he employs an attorney, and submits to his superior judgment the conduct of the litigation."¹²⁴

The English rule, however, does not seem to limit the attorney's power to matters that affect the remedy only, as it is more broadly laid down that "the attorney is the general agent of his client in all matters that may be deemed likely to arise in the progress of the cause or the collection of the debt."¹²⁵ If he acts without the instructions of his client, he will not be liable to him if his acts have been bona fide, and marked with reasonable care and skill. If he acts in violation of express instructions, he will be liable to his client, and the latter will be bound by his action, so far as the adverse party is concerned, unless that party was cognizant of the violated instructions.¹²⁵

Beliveau v. Amoskeag Mfg. Co., 68 N. H. 225, 73 Am. St. Rep.

Beliveau v. Amoskeag Mfg. Co., 68 N. H. 225, 73 Am. St. Rep.

Levy v. Brown, 56 Miss. 89.

Prestwick v. Poley, 18 C. B. (N. S.) 806; *Chown v. Parrott*.

§ 641. Client's control over action.

In the previous section, it has been seen that where an attorney at law is retained in a case he has very large, if not exclusive, power and authority in the prosecution and management of the suit, in all matters that affect the remedy only; and that the client could not control or interfere with him in the conduct of the cause. But this power does not extend to the right or action itself. As to this it is a general rule that the parties to an action have a perfect right to settle their case out of court and without the intervention, consent, or knowledge of their attorneys.¹²⁶ It is the client's action and not the attorney's, and the former is quite competent to do with the action as he sees fit. The attorney's power only extends to the management of the case while it is in his power; and if it is taken away from him by settlement or otherwise, he has no right to prevent it. Before judgment the attorney has no such lien as will prevent his client from settling the case without his consent or intervention.¹²⁷ And a contract of employment containing a provision preventing the client from settling or discontinuing the suit without the attorney's consent is contrary to public policy and void.¹²⁸ "The law encourages the amicable adjustment of disputes, and a construction of a contract which would operate to prevent the client from settling will not be favored."¹²⁹ Thus it is held that a party may withdraw pleadings interposed by his attorney while the retainer ex-

14 C. B. (N. S.) 74; *Fray v. Voules*, 1 El. & El. 839; *Strauss v. Francis*, L. R. 1 Q. B. 379; *Levy v. Brown*, 56 Miss. 88.

¹²⁶ *Jordan v. Hunt*, 3 Dowl. 666; *Nelson v. Wilson*, 6 Bing. 568; *Francis v. Webb*, 7 C. B. 731; *Hawkins v. Loyless*, 39 Ga. 5; *Green v. Southern Exp. Co.*, 39 Ga. 20; *Coughlin v. N. Y. Cent. & H. R. R. Co.*, 71 N. Y. 443, 27 Am. Rep. 75; *Yoakley v. Hawley*, 5 Lea (Tenn.) 670; *Hooper v. Welch*, 43 Vt. 169, 5 Am. Rep. 267.

¹²⁷ *Simmons v. Almy*, 103 Mass. 33; *Parker v. Blighton*, 32 Mich. 266; *Cameron v. Boeger*, 200 Ill. 84, 93 Am. St. Rep. 165. And see post, § 732.

¹²⁸ *Davis v. Webber*, 66 Ark. 190, 74 Am. St. Rep. 81; *Ellwood v. Wilson*, 21 Iowa, 523; *Lewis v. Lewis*, 15 Ohio, 715; *North Chicago St. R. Co. v. Ackley*, 171 Ill. 100; *Williams v. Ingersoll*, 89 N. Y. 518.

¹²⁹ *Ellwood v. Wilson*, 21 Iowa, 523.

without regard to the attorney,¹³⁰ or file exceptions to a judgment signed by himself alone.¹³¹ So an attorney authorized to collect a judgment cannot be heard to oppose an amendment reducing the amount of recovery to which his client has assented, where there is nothing preventing the client from consenting to the reduction.¹³² But where the parties make such a settlement without the knowledge or consent of their attorneys, they must act in good faith and without any idea of cheating or defrauding the attorney out of his fees.¹³³

As to all matters in court, it has been held, in California, that a party must be heard in court through his attorney, if he has one, and the court has no power or authority to recognize any one in the conduct or disposition of a case except the attorneys of record, and that a judgment of dismissal entered upon a stipulation signed by the plaintiff alone should be set aside upon motion of the plaintiff's attorney.¹³⁴ But as was said by the court in *Toy v. Haskell*,¹³⁵ "the question here under consideration relates to the power of a party to control the course of the action in a case; and the case, therefore, is to be distinguished from those which merely involve the right of the party to compromise, settle, and acknowledge satisfaction of the claim on which the action is based." In a late Illinois case, however, it is held that a complainant in chancery has the right to dismiss the suit by a stipulation signed by himself, without the knowledge or consent of his solicitor.¹³⁶ Although the better practice undoubtedly is not to dismiss a suit in the absence of plaintiff's counsel, upon motion of defendant's counsel based upon a stipulation to that effect,

Reeder v. Lockwood, 30 Misc. (N. Y.) 531.

Aukam v. Zantzinger, 94 Md. 421.

Homans v. Tyng, 56 App. Div. (N. Y.) 383.

Hawkins v. Loyless, 39 Ga. 5; *Roberts v. Doty*, 31 Hun (N. Y.) 128; *Pearl v. Robitcheck*, 2 Daly (N. Y.) 138; *Francis v. Webb*, 100 N. Y. 731. See post, § 732.

Toy v. Haskell, 128 Cal. 558, 79 Am. St. Rep. 70; *Wyllie v. Gold Co.*, 120 Cal. 485.

128 Cal. 558, 79 Am. St. Rep. 70.

Cameron v. Boeger, 200 Ill. 84, 93 Am. St. Rep. 165.

signed by the plaintiff in person, yet where such stipulation is not fraudulently, or improperly obtained, the action of the court in dismissing the suit will not be set aside, for it is better that clients should be at liberty to adjust their difficulties if they can.¹³⁷

This doctrine has been well discussed in a late Nebraska case as follows: "Ordinarily, a litigant may make such disposition of an action pending, to which he is a party plaintiff, as his wisdom and judgment may dictate; and, if a plaintiff chooses to settle or discontinue an action without the consent of his attorneys, this he has the lawful right to do, and the action should be dismissed on his motion. This rule, it would seem, is but natural justice, and giving to an individual his undoubted right to manage his private affairs according to his own conception of what is best for his individual interests. * * * It is not the policy of the law to encourage litigation and coerce parties to continue in the prosecution of a suit in which they have lost faith in the merits of their cause of action. On the contrary, all such should be encouraged to discontinue that which will probably only result in an unprofitable and useless waste of time and expenditure of money. The right of the plaintiffs to dismiss their action and terminate the controversy, so far as their individual interests are affected, can hardly be questioned, and, we take it for granted, is conceded. They are the owners of the cause of action, to the extent of their interests therein, have absolute control thereof, and the right to dismiss their action when their own judgment approves of the same. We know of no principle of law, and are aware of no rule of practice, which will compel a party to continue the prosecution of a suit, involving only private rights, at his own expense, and against his will. He may lawfully terminate the agency created by the employment of his attorneys engaged to conduct the litigation, and take such proper steps as will release him from further responsibility and costs, by a dismissal of his cause of action."¹³⁸

¹³⁷ *Henchey v. Chicago*, 41 Ill. 136; *Cameron v. Boeger*, 200 Ill. 84, 93 Am. St. Rep. 165; *Volgt Brewery Co. v. Donovan*, 103 Mich. 190.

¹³⁸ *Williams v. Miles*, 63 Neb. 851.

2. What powers included in attorney's implied powers— In general.

As has been seen in a previous section, an attorney has authority not only to simply conduct a case, in a strict and technical sense, but, as incidental thereto, he has the implied power to do such acts as are necessary and incidental to its proper conduct and management, that do not affect the client's rights. He may waive formal notice in the pleadings of the cause;¹³⁹ or waive mere informalities and technicalities;¹⁴⁰ or he may, where he has knowledge of the facts, make such affidavits as are required in the progress of the case;¹⁴¹ or verify pleadings.¹⁴² He may, in good faith and for the client's benefit, serve or accept service of all necessary and proper papers, etc., during the progress of the case, after the suit has commenced;¹⁴³ or get briefs printed at his client's expense;¹⁴⁴ or bind his client to pay for copies of evidence furnished by a stenographer or court reporter at the request of the attorney, for use in the trial of a

Hefferman v. Burt, 7 Iowa, 320, 71 Am. Dec. 445; *Smith v. Ingham*, 59 Kan. 552; *Barlow v. Steel*, 65 Mo. 611; *McDonough v. Daly*, 3 Mo. App. 606; *People v. Wyckoff*, 2 Edw. Ch. (N. Y.)

Hanson v. Holtz, 14 N. H. 56; *Alton v. Gilmanton*, 2 N. H. 280; *Coleman v. Coleman*, 5 Hawaii,

Murphy v. Winter, 18 Ga. 690; *Wright v. Parks*, 10 Iowa, 342; *Key v. Headley*, 10 Kan. 88; *Simpson v. Lombas*, 14 La. Ann. 575; *Clark v. Morse*, 16 La. (O. S.) 575; *Austin v. Latham*, 19 La. 88; *Murphy v. Jack*, 76 Hun (N. Y.) 356; *Simon v. Johnson*, 7 Kulp (Pa.) 166; *Willis v. Lyman*, 22 Tex. 268.

Wright v. Parks, 10 Iowa, 342; *Sizer v. Miller*, 9 Paige (N. Y.) 224; *Cheatham v. Pearce*, 89 Tenn. 668; *Bates v. Pike*, 9 Wis. 224.

Richardson v. Daly, 4 Mees. & W. 384; *Anderson v. Watson*, 5 P. 214; *Com. v. Schooley*, 5 Kulp (Pa.) 53.

Weisse v. New Orleans, 10 La. Ann. 46; *Williamson-Stewart & Co. v. Bosbyshell*, 14 Mo. App. 534; *Tyrrel v. Hammerstein*, 505 (N. Y.) 505; *Livingston Middleditch Co. v. New York College of Dentistry*, 30 Misc. (N. Y.) 831, affirmed in 31 Misc. 259. If an attorney shows that he stipulated that he was contracting with a printer as agent for his client. *Trimmer v. Thomson*, 41 S.

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case;¹⁴⁵ or for a stenographer's fees in proceedings in a case where such stenographer is employed to take the minutes.¹⁴⁶

So, as a general rule, he may, during the pendency of a cause, and with the consent of the court, submit his client's claim to arbitration, or consent to a reference.¹⁴⁷

¹⁴⁵ *Miller v. Palmer*, 25 Ind. App. 357, 81 Am. St. Rep. 107.

¹⁴⁶ *Harry v. Hilton*, 64 How. Pr. (N. Y.) 199; *First Nat. Bank v. Tamajo*, 77 N. Y. 476; *Thornton v. Tuttle*, 20 Abb. N. C. (N. Y.) 308.

¹⁴⁷ *Filmer v. Delber*, 3 Taunt. 486; *Dowse v. Cox*, 3 Bing. 20; *Faviell v. Eastern Counties R. Co.*, 2 Exch. 344; *Somers v. Balabrega*, 1 Dall. (U. S.) 177; *Holker v. Parker*, 7 Cranch (U. S.) 449; *Beverly v. Stephens*, 17 Ala. 701; *Scarborough v. Reynolds*, 12 Ala. 252; *Bates v. Vischer*, 2 Cal. 355; *Lee v. Grimes*, 4 Colo. 185; *Daniels v. City of New London*, 58 Conn. 156; *Wade v. Powell*, 31 Ga. 1; *McElreath v. Middleton*, 89 Ga. 83; *Connett v. Chicago*, 114 Ill. 233; *Talbot v. McGee*, 4 T. B. Mon. (Ky.) 375; *Smith's Heirs v. Dixon*, 3 Metc. (Ky.) 438; *Jones v. Horsey*, 4 Md. 306, 59 Am. Dec. 81; *White v. Davidson*, 8 Md. 169, 63 Am. Dec. 699; *Buckland v. Conway*, 16 Mass. 396; *Haskell v. Whitney*, 12 Mass. 47; *North Mo. R. Co. v. Stephens*, 36 Mo. 150, 88 Am. Dec. 138; *Jenkins v. Gillespie*, 10 Smedes & M. (Miss.) 31, 48 Am. Dec. 732; *Pike v. Emerson*, 5 N. H. 393, 22 Am. Dec. 468; *Brooks v. New Durham*, 55 N. H. 559; *Paret v. City of Bayonne*, 39 N. J. Law, 559; *Tilton v. U. S. Life Ins. Co.*, 8 Daly (N. Y.) 84; *Diedrick v. Richley*, 2 Hill (N. Y.) 271; *Yates v. Russell*, 17 Johns. (N. Y.) 461; *Tiffany v. Lord*, 40 How. Pr. (N. Y.) 481; *Morris v. Grier*, 76 N. C. 410; *Wilson v. Young*, 9 Pa. 101; *Bingham's Trustees v. Guthrie*, 19 Pa. 418; *Williams v. Tracey*, 95 Pa. 308, 310; *Sargeant v. Clark*, 108 Pa. 588; *Stokely v. Robinson*, 34 Pa. 315; *Smith v. Bossard*, 2 McCord Ch. (S. C.) 406; *Markley v. Amos*, 8 Rich Law (S. C.) 468. Compare *McPherson v. Cox*, 86 N. Y. 472; *Haynes v. Wright*, 4 Hayw. (Tenn.) 64; *King v. King*, 104 La. 420; *Stinerville & B. Stone Co. v. White*, 25 Misc. (N. Y.) 314.

In *McGinnis v. Curry*, 13 W. Va. 29, 47, Green, P., discusses this doctrine as follows: "The authority of an attorney at common law, by a consent order made in the court, to submit a pending suit to arbitration, is universally admitted. And the court, in cases where such a consent order has been made at the instance of counsel, have frequently spoken of the authority of counsel, to submit a controversy of his client to arbitration in general language, which would be broad enough to include, not only a case of a submission of a controversy in a pending suit by an agreement of counsel in pais, but even a controversy about which no suit was pending. But all the cases in which such loose and gen-

may dismiss or discontinue an action, in term time
 tion, provided such action merely postpones his

language was used were cases, where the authority of the
 was exercised, not only in a pending suit, but by a consent
 agreeing to the submission made in open court. See *Wilson*
g, 9 Pa. 101; *Holker v. Parker*, 7 Cranch (U. S.) 449;
v. Balabrega, 1 Dall. (U. S.) 177; *Bingham's Trustees v.*
 19 Pa. 418. In England, though, so far as I know, it has
 been decided that an attorney had a right to submit his
 controversy to arbitration, when no suit was pending,
 yet there are English cases from which it may be in-
 that the courts may there consider the power of the attor-
 submit his client's cause to arbitration in general, and not
 to pending suits, or to orders of reference made in court.
Will v. Leigh, 8 Term R. 571; *In re Jamieson*, 4 Adol. & E.
 E. C. L. 411). But in considering how much weight should
 be given to these dicta of English judges, it should be remem-
 bered that an attorney in England occupies toward his client a
 different relation from what he does in this country. There
 he is frequently the general agent of the client, and transacts
 the whole of his general business. But here an attorney is gen-
 erally employed to attend to his client's interest in reference to
 a single controversy. In Pennsylvania, too, there are decisions
 which might seem to imply that the power of an attorney, to sub-
 mit to arbitration, was not confined to the making of a consent or-
 der pending cause to refer it to arbitration. See *Bingham's*
v. Guthrie, 19 Pa. 419. But in considering what weight
 should be attached to the dicta of Pennsylvania judges, it should also
 be in mind, that in Pennsylvania the authority of attorneys is
 less extensive than elsewhere. See *Lynch v. Com.*, 16 Serg. & R. 368;
Young, 9 Pa. 101. While I have found no case deciding that
 an attorney has a general authority to submit his client's controversy
 to arbitration, there are cases in which it has been decided that he
 does not possess such general authority. See *Jenkins v. Gillespie*, 10
Pa. & M. (Miss.) 31; *Scarborough v. Reynolds*, 12 Ala. 252. It is
 not that there were cases in which there was no *lis pendens*. But it
 seems to me that, as it is held that an attorney by reason of his
 employment to institute a suit or defend a threatened suit has
 no authority to submit, by an agreement in pais signed by the at-
 torney, the case to arbitration, that it must follow that he has no
 authority, though the suit be pending. An authority to act
 could only be inferred, if it exist, from his employment
 for the institution of the suit as an attorney; and such employ-
 ment, as we have seen, confers no such authority. This conclusion is
 not inconsistent with the numerous causes deciding that an

client's rights;¹⁴⁸ or agree to a nonsuit;¹⁴⁹ or bring a new action after nonsuit;¹⁵⁰ or he may restore an action after a non pros. even though without the consent of his client;¹⁵¹ or accept joinder in issue, although contrary to his client's order;¹⁵² or enter a remittitur after verdict.¹⁵³

So the attorney has, by virtue of his retainer, authority to attach when necessary;¹⁵⁴ and it seems that he has, before

attorney has authority in a pending suit by an order of court to submit the cause to arbitration. When the courts have assigned any reason for their decisions, they have been based not merely, if at all, on the employment of the counsel by the client, but on the fact that he is an officer of the court acting in the presence and under the control of the court, and as such has a right to take any legal steps, he may deem proper, in prosecuting or defending the suit. * * * And why, it is asked, may he not in court consent to an order submitting the case to arbitrators, this being one of the legal modes of prosecuting or defending a suit? See *Talbot v. McGee*, 4 T. B. Mon. (Ky.) 377; *Wade v. Powell*, 31 Ga. 1; *Buckland v. Conway*, 16 Mass. 396; *Smith v. Bossard*, 2 McCord Ch. (S. C.) 408. But this reasoning has no application to any action of the attorney in pais, such as agreeing to submit the case to arbitrators by an agreement signed by him without any special authority from his client. Such an act on his part is in principle undistinguishable from a similar act, done by him before the institution of the suit. And I therefore conclude he has no authority to so act."

¹⁴⁸ *McLeran v. McNamara*, 55 Cal. 508; *Paxton v. Cobb*, 2 La. 137; *Rogers v. Greenwood*, 14 Minn. 333 (Gil. 256); *Davis v. Hall*, 90 Mo. 659; *Gaillard v. Smart*, 6 Cow. (N. Y.) 385; *Barrett v. Third Ave. R. Co.*, 45 N. Y. 628; *Simpson v. Brown*, 1 Wash. T. 248.

¹⁴⁹ *Lynch v. Cowell*, 12 Law T. (N. S.) 548.

¹⁵⁰ *Scott v. Elmendorf*, 12 Johns. (N. Y.) 317; *Holbert v. Montgomery's Adm'rs*, 5 Dana (Ky.) 11.

¹⁵¹ *Reinholdt v. Alberti*, 1 Bin. (Pa.) 469.

¹⁵² *Latuch v. Pasherante*, 1 Salk. 86.

¹⁵³ *Yarmouth v. Russell*, 2 Ld. Raym. 1142; *Lamb v. Williams*, 1 Salk. 89, 6 Mod. 82; *Holbert v. Montgomery's Adm'rs*, 5 Dana (Ky.) 11; *Pickett's Ex'rs v. Ford*, 4 How. (Miss.) 246.

¹⁵⁴ *Fairbanks v. Stanley*, 18 Me. 296; *Jenney v. Delesdernier*, 20 Me. 183; *Rice v. Wilkins*, 21 Me. 558; *Kirksey v. Jones*, 7 Ala. 622; *Muir v. Orear*, 87 Mo. App. 38; *Poucher v. Blanchard*, 86 N. Y. 256; *Feury v. McCormick Harvesting Mach. Co.*, 6 S. D. 396. But he cannot authorize the sheriff to keep open a restaurant levied on. *Alexander v. Denaveaux*, 59 Cal. 476. See, also, *Pierce v. Strickland*, 2 Story, 292, Fed. Cas. No. 11,147.

ent, the implied power to release property attached, giving other security;¹⁵⁵ or he may assent to an assignment for the benefit of creditors;¹⁵⁶ or make an election to receive the price of goods or the goods themselves if the court decides there is such an election.¹⁵⁷ An attorney's implied powers after judgment has been rendered are seen in a subsequent section.¹⁵⁸

Powers not included. But an attorney has not, by virtue of his general retainer, the implied power to do any thing like any agreement, nor to control any matters that might affect or tend to destroy the client's right or cause of action. He cannot extend the day of payment of a claim or give his hands for collection, upon receiving security;¹⁵⁹ nor assign or transfer such claim to a third person;¹⁶⁰ nor make a demand and take other security;¹⁶¹ nor release a party summoned as a debtor of the defendant;¹⁶² nor compromise his client's cause of action,¹⁶³ or security, without

Benson v. Hawley, 30 Conn. 51, 79 Am. Dec. 233; *Benson v. Me.* 76; *Jenny v. Delesdernier*, 20 Me. 183; *Moulton v. 115 Mass.* 36, 15 Am. Rep. 72; *Wieland v. White*, 109 Mass. 1; *Wy v. Brown*, 56 Miss. 83; *Pierce v. Strickland*, 2 Story, 292, No. 11,147. But see *Ludden v. Sumter*, 45 S. C. 186, 55 Rep. 761.

Man v. Coolidge, 1 Sumn. 537, Fed. Cas. No. 5,606. And *Att v. Darlington Phosphate Co.*, 43 S. C. 5.

Att v. Spalding, 1 Cal. 213.

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Khart v. Wyatt, 10 Ala. 231, 44 Am. Dec. 481; *Osborn v. 35 Ind.* 321; *Beatty v. Hamilton*, 127 Pa. 71; *Haselton v. e Marble Co.*, 94 Fed. 701. Compare *Crawford v. Nolan*, 197.

g v. Ely, 5 Stew. & P. (Ala.) 354; *Russell v. Drummond*, 16; *Goodfellow v. Landis*, 36 Mo. 168; *Feiner v. Puetz*, 77 405; *White v. Hildreth*, 13 N. H. 104; *Child v. Eureka Works*, 44 N. H. 354; *Card v. Walbridge*, 18 Ohio, 411; *Row-Slate*, 58 Pa. 196; *Annely v. De Saussure*, 12 S. C. 488; *a v. Patchin*, 5 Vt. 346. See, also, *Terhune v. Colton*, 10 21.

kersley v. Anderson. 4 Desaus. (S. C.) 44.

cles v. Porter, 12 Mo. 76.

hams v. Gay, 73 Ill. 415; *Cox v. New York Cent. & H. R. N. Y.* 414; *Mandeville v. Reynolds*, 68 N. Y. 528; *Gilliland*

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payment.¹⁶⁴ Nor may an attorney, employed to collect a debt or enforce a claim, release a surety thereon, without satisfaction;¹⁶⁵ but if an attorney agrees with a surety on a delivery bond that if he will procure and deliver to the sheriff the property specified in the bond, the surety shall be released from the judgment and from all claim for damages assessed for the value of the use of the property, the agreement is within the limits of the attorney's authority, and evidence that it was authorized or ratified is unnecessary, if the property was in fact delivered to the sheriff by the surety.¹⁶⁶ Nor can an attorney release, without express authority, a mortgage,¹⁶⁷ or vendor's lien;¹⁶⁸ or the indorser upon a note, which he has received for collection, without satisfaction or the express consent of his client.¹⁶⁹ Nor has he the implied power to release the interest of a party in order that he may testify as a witness;¹⁷⁰ nor may he indorse for his client, a note left with him for collection;¹⁷¹ but where an attorney with authority to collect a claim receives a draft on the debtor, or his agent, for the amount of the claim, he has implied authority to bind his principal by an indorsement

v. Gasque, 6 S. C. 406; Richardson Drug Co. v. Dunagan, 8 Colo. App. 308.

¹⁶⁴ Terhune v. Colton, 10 N. J. Eq. 21; Tankersley v. Anderson, 4 Desaus. (S. C.) 45.

¹⁶⁵ Savings Inst. v. Chinn, 7 Bush (Ky.) 539; Givens v. Briscoe, 3 J. J. Marsh. (Ky.) 529, 532; Roberts v. Smith, 3 La. Ann. 205; Union Bank v. Govan, 10 Smedes & M. (Miss.) 333; Stoll v. Sheldon, 13 Neb. 207.

¹⁶⁶ Willis v. Chowning, 90 Tex. 617, 59 Am. St. Rep. 842.

¹⁶⁷ Ludden v. Sumter, 45 S. C. 186; Armstrong v. Hurst, 39 S. C. 498.

¹⁶⁸ Engelbach v. Simpson, 12 Tex. Civ. App. 188.

¹⁶⁹ East River Bank v. Kennedy, 9 Bosw. (N. Y.) 543; Varnum v. Bellamy, 4 McLean, 87, Fed. Cas. No. 16,886; York Bank v. Appleton, 17 Me. 55.

¹⁷⁰ Ball v. Bank of Ala., 8 Ala. 590, 42 Am. Dec. 649; Marshall v. Nagel, 1 Bailey (S. C.) 308; Bowne v. Hyde, 6 Barb. (N. Y.) 392; Murray v. House, 11 Johns. (N. Y.) 464; York Bank v. Appleton, 17 Me. 55; Springer v. Whipple, 17 Me. 351; Shores v. Caswell, 13 Metc. (Mass.) 413; Succession of Weigel, 18 La. Ann. 49.

¹⁷¹ Child v. Eureka Powder Works, 44 N. H. 354; Sherrill v. Weisiger Clothing Co., 114 N. C. 436.

draft to enable him to receive the amount due there-

may he enter a retraxit, that being a perpetual bar, authorized to do so by statute;¹⁷³ nor waive the right of acquiescence;¹⁷⁴ nor go on journeys on the client's behalf at his expense;¹⁷⁵ nor employ assistant counsel at the client's expense,¹⁷⁶ except in the absence of the latter.¹⁷⁷ An attorney has not the implied power to admit or accept of the original process by which a proceeding is commenced;¹⁷⁸ but an acknowledgment of service by the defendant's attorney is sufficient to authorize a judgment in default against the defendant in attachment, unless the contrary appears by competent proof.¹⁷⁹ Nor may the defendant's attorney in a criminal case waive a trial by a jury of twelve men and consent to a trial by a less number, without consulting the defendant, although he is present in court.

Nor can an attorney withdraw an answer and appear in default merely because the client has failed to pay his fee. Such an act is one of bad faith, and therefore beyond the scope of an attorney's authority.¹⁸¹

National F. Ins. Co. v. Eastern Bldg. & Loan Ass'n, 63 Neb. 485, 102 N. W. 1000, 101 U. S. 686, 100 U. S. 686, 100 U. S. 686. *National Bank of Republic v. Old Town Bank*, 112 Fed. 726. *Robert v. Sandford*, 2 Blackf. (Ind.) 137, 18 Am. Dec. 149; *Case*, 8 Coke, 58; *Lamb v. Williams*, 1 Salk. 89, 6 Mod. 159; *Mason v. Odum*, 31 Ala. 108, 68 Am. Dec. 159; *Hallack v. Colo.* 74; *Barnard v. Daggett*, 68 Ind. 305. Compare *United v. Parker*, 120 U. S. 89; *Wohlford v. Compton*, 79 Va. 333. *Eden v. Clark*, 2 Grant Cas. (Pa.) 107. See, also, *Bingustees v. Guthrie*, 19 Pa. 418. *Snell*, 5 Ch. Div. 815, 22 Eng. R. 485. *Ing v. Crawford*, 23 Mo. App. 432; *Voorhies v. Harrison*, 22 Mo. App. 85. And see post, § 651. *Ing v. Town of Georgia*, 10 Vt. 68. And see post, § 651. *Key v. Buckland*, 1 Exch. 1; *Clark v. Morrison*, 85 Ga. 229. Better authorizing him to acknowledge the declaration does not give him authority to waive process; *Atchison, T. & S. F. Benton*, 42 Kan. 707; *Masterson v. Le Claire*, 4 Minn. 163; *Welch*, 100 Mo. 258; *Starr v. Hall*, 87 N. C. 381; *Reed*, 19 S. C. 548; *Ashcraft v. Powers*, 22 Wash. 440. *Dix v. Cawthorn*, 71 Ga. 742; *Buice v. Lowman Gold & S.* 64 Ga. 769. *Wynn v. State*, 16 Ind. 496. *Nicholls v. Nicholls*, 5 N. D. 125, 57 Am. St. Rep. 540.

Although there are many acts which the attorney has not, by virtue of his general retainer, the implied power to perform, yet the authority to do so may, of course, be expressly or impliedly given by the client. Or his acts, though previously unauthorized, may subsequently be ratified by acquiescence of the client.¹⁸²

§ 643. To make stipulations.

An attorney may in good faith make any agreement or stipulations during the progress of the cause that is necessary for the advancement of his client's interest and that does not prejudice the latter's substantial rights.¹⁸³ He may thus make certain agreements and stipulations in reference to the conduct of the cause, but where the statute requires the agreement to be filed with the clerk or entered on the minutes, a verbal agreement would not be binding on the client.¹⁸⁴ And the attorney for one defendant cannot stipulate for another defendant, where there are several defendants, and each has his own attorney.¹⁸⁵ He may stipulate as to the issues to be tried;¹⁸⁶ or he may stipulate that the judgment or decision in one case shall be the judgment or decision in another case pending and involving the same questions of law and fact.¹⁸⁷ He may make stipulations for

¹⁸² *Erwin v. Blake*, 8 Pet. (U. S.) 24; *Robb v. Roelker*, 66 Fed. 23; *Dresser v. Wood*, 15 Kan. 344; *Ryan v. Doyle*, 31 Iowa, 53; *Cook v. Greenberg* (Tex. Civ. App.) 34 S. W. 689; *Lambert v. Gillette*, 24 Wash. 726.

¹⁸³ *Farmers' Trust & Canal Bank v. Ketchum*, 4 McLean, 120. Fed. Cas. No. 4,670; *Halliday v. Stuart*, 151 U. S. 229; *Wadsworth v. First Nat. Bank*, 124 Ala. 440; *In re Heath's Will*, 83 Iowa, 215; *Lockwood v. Black Hawk County*, 34 Iowa, 235; *Calmes v. Stone*, 7 La. Ann. 133; *Mahoney v. Middlesex County Com'rs*, 144 Mass. 459; *Lorimer v. Lorimer*, 124 Mich. 631; *Rogers v. Greenwood*, 14 Minn. 333 (Gil. 256); *McCann v. McLennan*, 3 Neb. 25; *Hanson v. Hottt*, 14 N. H. 56; *Ward v. Wilson*, 17 Tex. Civ. App. 28.

¹⁸⁴ *Borkheim v. North British & M. Ins. Co.*, 38 Cal. 623; *Merritt v. Wilcox*, 52 Cal. 238; *Smith v. Polack*, 2 Cal. 92; *State v. Stewart*, 74 Iowa, 336; *McCann v. McLennan*, 3 Neb. 25; *Hardin v. Iowa R. & Const. Co.*, 78 Iowa, 726; *Goben v. Goldsberry*, 72 Ind. 44.

¹⁸⁵ *Hobbs v. Duff*, 43 Cal. 485.

¹⁸⁶ *Bingham v. Winona County Sup'rs*, 6 Minn. 136 (Gil. 82).

¹⁸⁷ *Louisville Trust Co. v. Stone*, 88 Fed. 407, affirmed in 174 U.

at time to file pleadings;¹⁸⁸ or agree that an award of a referee shall be final;¹⁸⁹ or that the decision of the court shall be final and thus waive right of appeal.¹⁹⁰ He cannot enter into any agreement or stipulation by which his client's substantial rights will be waived or lost. He cannot agree with other attorneys not to try a case during a particular period;¹⁹² or stipulate not to appear for a new trial;¹⁹³ nor agree that a dismissal will be a bar to a subsequent action for malicious prosecution. He cannot agree that his client will refund money overpaid. Nor can he, without further authority, bind his client by an agreement collateral to, and independent of the main matter of, a suit intrusted to his management.¹⁹⁶

Stone v. Bank of Commerce, 174 U. S. 412; *Ohlquest v. Farwell*, 134 Iowa, 231; *North Mo. R. Co. v. Stephens*, 36 Mo. 150, 88 Mo. 138; *Scarritt Furniture Co. v. Moser*, 48 Mo. App. 543; *North Kan. R. Co. v. Pavey*, 57 Kan. 521. But a guardian ad litem cannot make such a stipulation so as to bind an infant party. *Finnegan*, 48 Minn. 53; *McClure v. Farthing*, 51 Mo. 109; *Ed v. Burwell*, 5 How. Pr. (N. Y.) 341. *Winfield v. Thorp*, 71 Fed. 924; *Brooks v. Cavanaugh*, 11 Mo. 183; *Hefferman v. Burt*, 7 Iowa, 320, 71 Am. Dec. 445; *North v. First Nat. Bank*, 124 Ala. 440; *Southern Kan. R. Co. v. Pavey*, 57 Kan. 521. *Johnson v. Young*, 9 Pa. 101; *Bingham's Trustees v. Guthrie*, 118 Pa. 18; *Brooks v. New Durham*, 55 N. H. 559; *Williams v. Johnson*, 91 Pa. 232; *Sargeant v. Clark*, 108 Pa. 588; *Lew v. Nolan*, 10 Pa. Leg. J. (N. S.; Pa.) 47, 8 Pa. Dist. R. 531. *Smith v. Barnes*, 9 Misc. (N. Y.) 368; *In re Heath's Will*, 83 Mo. 55; *Franklin v. National Ins. Co.*, 43 Mo. 491. *Washburn, St. L. & P. R. Co. v. McDougall*, 126 Ill. 111, 9 Am. 539; *Chicago General R. Co. v. Murray*, 174 Ill. 259; *Howe v. Pence*, 22 N. J. Law, 99; *Dickerson v. Hodges*, 43 N. J. Eq. 46; *Pavey v. Whitthorne* (Tenn. Ch. App.) 58 S. W. 380; *Lytle v. Johnson*, 69 App. Div. (N. Y.) 273. *Bert v. Commercial Bank*, 13 La. 528, 33 Am. Dec. 570. *People v. City of New York*, 11 Abb. Pr. (N. Y.) 66; *Sargeant v. Johnson*, 108 Pa. 591. See, also, *Baron v. Cohen*, 62 How. Pr. (N. Y.) 10; *Dickerson v. Hodges*, 43 N. J. Eq. 46. But see contra, *In re Heath's Will*, 83 Iowa, 215; *Pike v. Emerson*, 5 N. H. 393, 22 Am. 468. *Whitthorne v. Smith*, 11 Kan. 554. *Land v. Todd*, 36 Me. 149; *Miller v. Hulme*, 126 Pa. 277. *Underly v. Martin*, 69 Mo. App. 84.

§ 644. To make admissions or representations.

An attorney may, for purposes of the trial, either during or before the trial, admit certain facts;¹⁹⁷ but in order that such admission may bind his client, it must be distinct and formal, and made for the express purpose of dispensing with formal proof of the facts at that trial.¹⁹⁸ Therefore, mere loose declarations by him in conversation are not admissible against his client;¹⁹⁹ nor are admissions made long after trial and after the attorney's employment has ceased.²⁰⁰ And although the attorney may ordinarily bind his client by written admissions of facts in a case, yet if such admissions were made improvidently or through mistake, they may be relieved against, and set aside upon such terms as may be just.²⁰¹ Nor can he make admissions binding his client relating to the proper distribution of a fund when recovered.²⁰²

So representations made by an attorney in the presence of his client, upon the faith of which a third person advanced money, are binding on the client;²⁰³ likewise with a statement made by the attorney to the jury, in the hearing of the client, if he does not object thereto.²⁰⁴

¹⁹⁷ *Haller v. Worman*, 3 Law T. (N. S.) 741; *Oscanyan v. Winchester Repeating Arms Co.*, 103 U. S. 261; *Starke v. Kenan*, 11 Ala. 818; *Wilson v. Spring*, 64 Ill. 14; *Talbot v. McGee*, 4 T. B. Mon. (Ky.) 375; *Farmers' Bank v. Sprigg*, 11 Md. 389; *Lewis v. Sumner*, 13 Metc. (Mass.) 269; *Rogers v. Greenwood*, 14 Minn. 333 (Gil. 256); *Pratt v. Conway*, 148 Mo. 291, 71 Am. St. Rep. 602; *Sullivan v. Dunham*, 35 App. Div. (N. Y.) 342. Admissions by counsel for a person on trial for murder are evidence against him, when made in open court, and may be used by the jury as a basis for a verdict. *Com. v. McMurray*, 198 Pa. 51, 82 Am. St. Rep. 787.

¹⁹⁸ *Treadway v. Sioux City & St. P. R. Co.*, 40 Iowa, 526; *Scott v. Chambers*, 62 Mich. 532; *Weisbrod v. Chicago & N. W. R. Co.*, 20 Wis. 419.

¹⁹⁹ *Petch v. Lyon*, 9 Q. B. 147; *Parkins v. Hawkshaw*, 2 Starkie, 239; *Wilson v. Turner*, 1 Taunt. 398.

²⁰⁰ *Walden v. Bolton*, 55 Mo. 405.

²⁰¹ *Harvey v. Thorpe*, 28 Ala. 250, 65 Am. Dec. 344; *Rosenbaum v. State*, 33 Ala. 362.

²⁰² *Lyon v. Hires*, 91 Md. 411.

²⁰³ *Gilkeson v. Snyder*, 8 Watts & S. (Pa.) 200.

²⁰⁴ *Colledge v. Horn*, 3 Bing. 119.

To confess judgment.

As the rule in some cases that an attorney may confess judgment for his client, or consent to a decree against him;²⁰⁵ though other cases hold that he has not such authority, it is expressly given to him by his client.²⁰⁶ But an attorney may accept for his client a confession of judgment made by the adverse party;²⁰⁷ or consent to a decree on behalf of his client.²⁰⁸

Attorney's power to compromise.

As a general rule, an attorney has not, by virtue of his office, without his client's knowledge or consent, the implied power to compromise or settle in any manner, except payment in full, the claim or judgment of his client;²⁰⁹

James v. Rogers, 13 Cal. 191; *Williams v. Simmons*, 79 Ga. 100; *Don v. Williams*, 42 Ga. 168; *Taylor v. American Freehold Mortg. Co.*, 106 Ga. 238; *Webster v. Dundee Mortg. & Trust Co.*, 106 Ga. 278; *Thompson v. Pershing*, 86 Ind. 303; *Hudson v. ...*, 54 Ind. 215; *Devenbaugh v. Nifer*, 3 Ind. App. 379; *Potter v. ...*, 14 Iowa, 286; *Graves v. Long*, 87 Ky. 441; *Holbert v. ...*, 5 Dana (Ky.) 11; *Dockham v. Potter*, 27 La. 302; *Dockham v. New Orleans*, 26 La. Ann. 302; *Farmers' Bank v. ...*, 11 Md. 389; *Denton v. Noyes*, 6 Johns. (N. Y.) 296, 5 C. 237; *Beardsley v. Pope*, 88 Hun (N. Y.) 560; *Hairston v. ...*, 123 N. C. 345; *Henry v. Hilliard*, 120 N. C. 479; *Cyphert v. ...*, 22 Pa. 195; *Flanigen v. Philadelphia*, 51 Pa. 491; *Jones v. ...*, 5 Cold. (Tenn.) 371.

Wester v. Wade, 69 Cal. 133; *San Francisco v. Le Roy*, 138 U. S. 100; *People v. Lamborn*, 2 Ill. 123; *Wadhams v. Gay*, 73 Ill. 100; *Alquest v. Farwell*, 71 Iowa, 233; *Kilmer v. Gallagher*, 112 Ill. 33, 84 Am. St. Rep. 358; *Edwards v. Edwards*, 29 La. Ann. 303; *Walker v. Grayson*, 86 Va. 337 (cannot consent to a decree on behalf of an infant where he represents adverse interests).

Anniston v. McAusland, 9 Abb. Pr. (N. Y.) 214. *Farmers' Trust & Canal Bank v. Ketchum*, 4 McLean, 120, Fed. Cas. 4,670; *Holmes v. Rogers*, 13 Cal. 191; *Williams v. Simmons*, 79 Ga. 649; *Haas v. Chicago Bldg. Soc.*, 80 Ill. 248; *Jubilee Co. v. Harsfeld*, 20 Mont. 234; *Jones v. Williamson*, 5 Cold. 371.

Bank v. Scotia Bank v. Morrow, 17 N. Bruns. 343; *Abbe v. Rood*, 106, Fed. Cas. No. 6; *Bates v. Seabury*, 1 Sprague, 433, Fed. Cas. No. 1,104; *Holker v. Parker*, 7 Cranch (U. S.) 436; *... v. National Life Ins. Co.*, 56 Fed. 281; *Robinson v. Mur-*

though it has been held that, in the absence of any limitation of his authority known to the adverse party, or which he could, by reasonable inquiry, have learned, an attorney of record has authority, by an oral or written agreement entered on record, to effect a final disposition of his client's

phy, 69 Ala. 543; Senn v. Joseph, 106 Ala. 454; Pickett v. Merchants' Nat. Bank, 32 Ark. 346; Preston v. Hill, 50 Cal. 43, 19 Am. Rep. 647; Ambrose v. McDonald, 53 Cal. 28; Hallack v. Loft, 19 Colo. 74; McMurray v. Marsh, 12 Colo. App. 95; Derwort v. Loomer, 21 Conn. 245; Wood v. Bangs, 2 Pen. (Del.) 435; Sonnebom v. Moore, 105 Ga. 497; Kaiser v. Hancock, 106 Ga. 217; McIntyre v. Meldrim, 63 Ga. 58; McClintock v. Helberg, 168 Ill. 384; People v. Quick, 92 Ill. 580; Wetherbee v. Fitch, 117 Ill. 67; Nolan v. Jackson, 16 Ill. 272; Wadhams v. Gay, 73 Ill. 415; Repp v. Wiles, 3 Ind. App. 167; Stuck v. Reese, 15 Iowa, 122; Martin v. Capital Ins. Co., 85 Iowa, 643; Kilmer v. Gallaher, 112 Iowa, 583, 84 Am. St. Rep. 358; Jones v. Inness, 32 Kan. 177; Brown v. Bunker, 19 Ky. L. R. 1527, 43 S. W. 714; Smith v. Dixon, 3 Metc. (Ky.) 438; Cox v. Adelsdorf, 21 Ky. L. R. 421, 51 S. W. 616; Dupre v. Splane, 16 La. (O. S.) 51; Phelps v. Preston, 9 La. Ann. 488; Maddux v. Bevan, 39 Md. 485; Fritchey v. Bosley, 56 Md. 94; Horsey v. Chew, 65 Md. 555, 559; Dalton v. West End St. R. Co., 159 Mass. 221, 38 Am. St. Rep. 410; Doon v. Donaher, 113 Mass. 151; Eaton v. Knowles, 61 Mich. 625; Nephew v. Michigan Cent. R. Co., 128 Mich. 599; Fitch v. Scott, 4 Miss. 314, 34 Am. Dec. 86; Spears v. Ledergerber, 56 Mo. 465; Mesick v. Ledergerber, 56 Mo. 466; Semple v. Atkinson, 64 Mo. 504; Walden v. Bolton, 55 Mo. 405; Smith v. Jones, 47 Neb. 108, 53 Am. St. Rep. 519; Hamrich v. Combs, 14 Neb. 381; Mandeville v. Reynolds, 68 N. Y. 528; Lewis v. Duane, 141 N. Y. 302; Smith v. Bradhurst, 18 Misc. (N. Y.) 546; Diamond Soda Water Mfg. Co. v. Hegeman & Co., 74 App. Div. (N. Y.) 430; Moye v. Coydell, 69 N. C. 93; Holden v. Lippert, 12 Ohio Circ. R. 767; Boyle v. Beattie, 2 Cin. R. (Ohio) 490; Barr v. Rader, 31 Or. 225; Huston v. Mitchell, 14 Serg. & R. (Pa.) 307, 16 Am. Dec. 506; Isaacs v. Zugsmith, 103 Pa. 77; North Whitehall v. Keller, 100 Pa. 105, 45 Am. Rep. 361; Brockley v. Brockley, 122 Pa. 1; Whipple v. Whitman, 13 R. I. 512, 43 Am. Rep. 42; Gilliland v. Gasque, 6 S. C. 406; Treasurers v. McDowell, 1 Hill (S. C.) 184, 26 Am. Dec. 166; Matthews v. Massey, 4 Baxt. (Tenn.) 450; East Line & R. R. Co. v. Scott, 72 Tex. 70, 13 Am. St. Rep. 758; Adam's Assignee v. Roller, 35 Tex. 711; Cook v. Greenberg (Tex. Civ. App.) 34 S. W. 687; Granger v. Batchelder, 54 Vt. 248, 41 Am. Rep. 846; Vail v. Conant, 15 Vt. 314; High v. Emerson, 23 Wash. 103; Watt v. Brookover, 35 W. Va. 323, 29 Am. St. Rep. 811; Crotty v. Eagle's Adm'r, 35 W. Va. 143; Kelly v. Wright, 65 Wis. 236.

of action by entry and satisfaction of judgment on payment of a stipulated sum, though the agreement and order thereon effect a compromise of the client's cause of action.²¹⁰ "When a claim is put into the hands of an attorney for collection, without further instruction, it is generally understood to be for the purpose of having it enforced by process, and it is not presumed that the attorney can or without process, compromise and settle it on such terms as his judgment or caprice may dictate."²¹¹ If the attorney does make such a compromise without the client's consent, the latter may have it set aside by the court and cause reinstated;²¹² or he may go on with the suit or institute a new one.²¹³

But if such attorney assumes the right to exercise the power to compromise the action, and does exercise such power, it is not to be presumed that he acted in the matter without full authority, and slight evidence only may be sufficient to authorize the belief that he was clothed with all the power he assumed to exercise.²¹⁴ Of course, if the client constitutes the attorney his agent to settle and compromise the action, the client is bound by the act of the attorney to the extent of the authority conferred and of such authority as any person with whom he deals has a right to believe him possessed. In such a case, if the attorney makes a settlement within the apparent scope of his authority, his client is bound by and cannot subsequently shield himself behind a restriction placed by him upon the attorney's authority, of which the party dealing with him had no notice and reason to believe that it existed.²¹⁵

Belliveau v. Amoskeag Mfg. Co., 68 N. H. 225, 73 Am. St. Rep.

North Whitehall v. Keller, 100 Pa. 105, 45 Am. Rep. 362.

Dalton v. West End St. R. Co., 159 Mass. 221, 38 Am. St. Rep.

Jones v. Inness, 32 Kan. 177; *North Whitehall v. Keller*, 100 Pa. 105, 45 Am. Rep. 361; *Smock v. Dade*, 5 Rand. (Va.) 639, 16 Dec. 780.

East Line & R. R. Co. v. Scott, 72 Tex. 70, 13 Am. St. Rep.

Diamond Soda Water Mfg. Co. v. Hegeman, 74 App. Div. (N. Y.) 30.

In England, however, the doctrine established by the later cases, after some vacillation, is that the attorney has power, by virtue of his retainer, to compromise the action in which he is retained, provided he acts bona fide and reasonably, and does not violate the positive instructions of his client, and that the compromise will bind the client, even if he does violate instructions, unless the violation is known to the adverse party.²¹⁶ And this doctrine has been followed by some of the American cases.²¹⁷ These latter cases, or at least a majority of them, do not hold directly contrary to the above general rule, but seem to be unwilling to disturb a compromise made by an attorney if it is reasonable and not detrimental to his client's interests. "Although an attorney at law," it has been said, "merely as such, has, strictly speaking, no right to make a compromise, yet a court would be disinclined to disturb one which was not so unreasonable in itself as to be exclaimed against by all, and to create an impression that the judgment of the attorney has been imposed on, or not fairly exercised in the case."²¹⁸ The reason on which this rule is based is that the attorney, within the scope of his retainer, is considered the general agent of the client. And it is strongly argued in support of the power that it ought to be upheld both as a matter of public policy and for the good

²¹⁶ *Swinfen v. Swinfen*, 18 C. B. 485; *Swinfen v. Chelmsford*, 5 Hurl. & N. 890, 6 Jur. (N. S.) 1035, 2 Law T. (N. S.) 406; *Chambers v. Mason*, 5 C. B. (N. S.) 59, 5 Jur. (N. S.) 148, 28 Law J. C. P. 10 (a fortiori when the client has a chance to object and does not); *Chown v. Parrott*, 14 C. B. (N. S.) 74; *Prestwick v. Poley*, 18 C. B. (N. S.) 806, 34 Law J. C. P. 189; *Fray v. Voules*, 1 El. & El. 839 (but not when the client expressly directs him not to enter into a compromise); *Butler v. Knight*, L. R. 2 Exch. 109; *Thomas v. Harris*, 27 Law J. Exch. 353; *In re Wood*, 21 Wkly. Rep. 104.

²¹⁷ *Whipple v. Whitman*, 13 R. I. 512, 43 Am. Rep. 42; *Mayer v. Foulkrod*, 4 Wash. C. C. 503, 511, Fed. Cas. No. 9,342; *Potter v. Parsons*, 14 Iowa, 286; *Bonney v. Morrill*, 57 Me. 368; *Peru Steel & Iron Co. v. Whipple File & S. Mfg. Co.*, 109 Mass. 464; *Roller v. Woolridge*, 46 Tex. 485; unless it be so unfair as to put the other party upon inquiry as to the authority or imply fraud, *Black v. Rogers*, 75 Mo. 441.

²¹⁸ By Chief Justice Marshall, in *Holker v. Parker*, 7 Cranch (U. S.) 436, 452.

the client, inasmuch as the attorney generally knows vastly more than the client whether it is better to risk the trial of the suit or to compromise it, and is often called upon to do one or the other suddenly in the absence of the client.²¹⁹ Thus, it has been held that if the compromise is fair and judicious, with the assent of the party in interest, although without the knowledge of the plaintiff of record, it will not be disturbed.²²⁰ So where there is not time or opportunity for consultation with the client, the attorney may, in the exercise of a reasonable discretion, negotiate a compromise where the circumstances are such that he must act without delay, and where the interests of his client will be seriously imperilled unless he so act, and if he act in good faith, with fair skill and vigilant care, he is not liable for damages.²²¹

Although the attorney may not have had authority to enter into a compromise, yet if the parties subsequently ratify an act by him, it will be immaterial that he previously acted without authority.²²² Or express authority may have been given to the attorney to compromise the claim.

Attorney's power to execute bonds.

It is a general rule of agency that in order for an agent to execute an instrument under seal, authority to do so must have been conferred upon him by a sealed instrument.²²³ It may be stated as a general rule that an attorney cannot, by virtue of his general retainer, the implied power given to him by his client by a bond executed by him in the client's

Whipple v. Whitman, 13 R. I. 512, 43 Am. Rep. 42.

Whipple v. Whitman, 13 R. I. 512, 43 Am. Rep. 42; *Jeffries v. Mutual L. Ins. Co. of N. Y.*, 110 U. S. 305; *Vickery v. McClellan*, 131; *White v. Davidson*, 8 Md. 169, 63 Am. Dec. 699; *Peru & Iron Co. v. Whipple File & S. Mfg. Co.*, 109 Mass. 464; *My v. Mariner*, 15 Wis. 172.

Union M. L. Ins. Co. v. Buchanan, 100 Ind. 63; *Repp v. Wiles*, 1 App. 167; *Freeman v. Brehm* (Ind. App.) 30 N. E. 712, 31 Ind. 545.

Denney v. Parker, 10 Wash. 218; *Gemberling v. Spaulding*, 101 Mich. 217; *Mayer v. Foulkrod*, 4 Wash. C. C. 511, Fed. Cas. No. 10,000.

ante, § 52.

name;²²⁴ but in order for him to do so, authority must have been conferred upon him by a sealed instrument. Thus, an attorney has not, by virtue of his general retainer, power to execute an appeal bond for his client;²²⁵ but such a bond executed by the general attorney of a corporation, in its name and under the corporate seal, is valid, it being presumed that the attorney has power to affix the seal.²²⁶ So employment of an attorney to prosecute an injunction suit does not necessarily confer upon him authority to bind his client to indemnify a third person who becomes surety on the bond for the injunction;²²⁷ nor may he execute a replevin bond in the name of his client;²²⁸ nor an injunction bond.²²⁹ But a bond of indemnity executed by an attorney whose authority was by parol is held valid against his client as a simple contract, without regard to the seal.²³⁰

The circumstances, however, in the different cases are varying, and by reason of such this power has been very frequently exercised, so that it would seem that this general rule is oftener not followed than followed. It has been seen that authority to do a certain act carries with it the implied power to do all other acts that are incidental and necessary to the accomplishment of the main purpose. If, therefore, the attorney has been retained to accomplish a certain end, and in the course of the transaction, it becomes necessary, in order to protect his client's interest, to execute an instrument under seal, it certainly would be more reasonable

²²⁴ *Clark v. Courser*, 29 N. H. 170; *Murray v. Peckam*, 15 R. I. 297.

²²⁵ *Gordon v. Camp*, 2 Fla. 23; *Love v. Sheffelin*, 7 Fla. 40; *Ex parte Holbrook*, 5 Cow. (N. Y.) 35; *Clark v. Courser*, 29 N. H. 170; *Schofield v. Felt*, 10 Colo. 146; *Murray v. Peckam*, 15 R. I. 297; *Coles v. Anderson*, 8 Humph. (Tenn.) 489. But see *Luce v. Foster*, 42 Neb. 818; *Adams v. Robinson*, 1 Pick. (Mass.) 462, holding that an attorney might bind his client by a recognizance on appeal; *Bach v. Ballard*, 13 La. Ann. 487, holding that an attorney may sign an appeal bond in the absence of his client.

²²⁶ *Indianapolis & St. L. R. Co. v. Morganster*, 103 Ill. 149.

²²⁷ *White v. Davidson*, 8 Md. 169, 63 Am. Dec. 699.

²²⁸ *Narraguagus Land Proprietors v. Wentworth*, 36 Me. 339.

²²⁹ Except in the client's absence. *Gauthier v. Gardenal*, 44 La. Ann. 884; *Bank of La. v. Wilson*, 19 La. Ann. 1.

²³⁰ *Ford v. Williams*, 13 N. Y. 577, 67 Am. Dec. 83. And see *Luce v. Foster*, 42 Neb. 818.

presume that he had the implied power to do so, than that the client's interests should suffer by adhering to a technical

Thus, where attorneys at law were employed to collect debts for nonresident clients, and it became necessary to levy, in reference to which they had not time to communicate with their clients, it was held that they had the implied authority to execute an indemnifying bond to protect the officer making the levy.²³¹ So attorneys, employed to collect a debt for a nonresident client, may execute an indemnifying bond in their own names, and if, acting in good faith and with prudence and discretion, they have suffered no damage thereby, they are entitled to reimbursement from the clients.²³² But it would seem that where the attorney and his client are resident in the same locality and the attorney can readily communicate with the latter, the attorney does not have such implied authority to execute an indemnifying bond; yet such authority may be expressly conferred upon him, not only by his client, but also by the authorized agent of such client.²³³ So an attorney ad hoc for an absentee may sign his client's name upon an appeal bond.²³⁴ The authority to take out attachment authorizes an attachment under similar circumstances.²³⁵ But it is not the duty of an attorney to make the affidavit or execute the bond in attachment, even where instructed to attach, and there is no liability on him for failing to do so.²³⁶

Although the client may not have authorized the execution of a bond in the first instance, yet he may, by his subsequent ratification or words, ratify or confirm an unauthorized execution. Where an attachment bond is executed by an agent or attorney and his principal appears in court and prosecutes the attachment, which had been sued out in his name, this

Clark v. Randall, 9 Wis. 135, 76 Am. Dec. 252; *Schoregge v. ...*, 29 Minn. 367, 371.

Clark v. Randall, 9 Wis. 135, 76 Am. Dec. 252.

Swartz v. Morgan, 163 Pa. 195, 43 Am. St. Rep. 786.

Bach v. Ballard, 13 La. Ann. 487; *Gauthier v. Gardenal*, 44 La. 884.

Trowbridge v. Weir, 6 La. Ann. 706; *Fulton v. Brown*, 10 La. 350.

Foulks v. Falls, 91 Ind. 315.

will be regarded as a full recognition of the authority to execute the bond.²³⁷

§ 648. Attorney's power to receive payment of a claim placed in his hands for collection.

(a) **In general.**—Where a claim is placed in an attorney's hands for collection, it impliedly gives him the necessary power to receive payment thereof, and such payment will be binding on the client.²³⁸ He may receive such payment not only from the debtor himself, but also from a third person as from the clerk of the court in which the claim was sought to be enforced;²³⁹ or from a stranger.²⁴⁰ He may also receive partial payments to be applied on the debt;²⁴¹ but he cannot receive such payments in full satisfaction of the debt or extend the time of payment of the balance, in consideration thereof;²⁴² nor can he take security to himself for the bal-

²³⁷ *Dove v. Martin*, 23 Miss. 588; *Bank of Augusta v. Conrey*, 28 Miss. 667.

²³⁸ *Vorley v. Garrad*, 2 Dowl. 490; *Yates v. Freckleton*, 2 Doug. 623; *Powel v. Little*, 1 W. Bl. 8; *Chouteau v. United States*, 95 U. S. 61; *Erwin v. Blake*, 8 Pet. (U. S.) 18; *Conway County v. Little Rock & Ft. S. R. Co.*, 39 Ark. 50; *Miller v. Scott*, 21 Ark. 396; *Williams v. State*, 65 Ark. 159; *Padfield v. Green*, 85 Ill. 529; *Newman v. Kiser*, 128 Ind. 258; *McCarver v. Nealey*, 1 G. Greene (Iowa) 360; *Ely v. Harvey*, 6 Bush (Ky.) 620; *Ducett v. Cunningham*, 39 Me. 386; *Patten v. Fullerton*, 27 Me. 58; *White v. Johnson*, 67 Me. 287; *Heard v. Lodge*, 20 Pick. (Mass.) 53, 32 Am. Dec. 197; *Hiller v. Ivy*, 37 Miss. 431; *Carroll County v. Cheatham*, 48 Mo. 385; *Whelan v. Reilly*, 61 Mo. 565; *Megary v. Funtis*, 5 Sandf. (N. Y.) 376; *Rogers v. McKenzie*, 81 N. C. 164; *Brown v. Mead*, 68 Vt. 215; *Johnson v. Gibbons*, 27 Grat. (Va.) 632; *Wilkinson v. Holloway*, 7 Leigh (Va.) 277; *Branch v. Burnley*, 1 Call (Va.) 147; *Wiley v. Mahood*, 10 W. Va. 223.

²³⁹ *Hiller v. Ivy*, 37 Miss. 431; *Newman v. Kiser*, 128 Ind. 258.

²⁴⁰ *Miller v. Scott*, 21 Ark. 396.

²⁴¹ *Hall Safe & Lock Co. v. Harwell*, 88 Ala. 441; *Pickett v. Bates*, 3 La. Ann. 627; *Davis v. Severance*, 49 Minn. 529; *Whelan v. Reilly*, 61 Mo. 565; *Williams v. Walker*, 2 Sandf. Ch. (N. Y.) 325; *Heyman v. Beringer*, 1 Abb. N. C. (N. Y.) 315; *Rogers v. McKenzie*, 81 N. C. 164.

²⁴² *Gerrish v. Maher*, 70 Ill. 470; *Ritch v. Smith*, 82 N. Y. 627; *Hutchings v. Munger*, 41 N. Y. 155.

²⁴³ But mere employment to obtain authority to sell not empower the attorney to receive the purchase money for the estate sold.²⁴⁴ Nor does the mere fact that he is authorized to receive interest empower him to receive principal of the principal, although the securities for the loan are in his possession, and are delivered to the payer when the payment is made.²⁴⁵

On written security.—Where, however, the debt is due on written security, the attorney's authority to receive payment must either be express or he must have in his possession the security itself;²⁴⁶ and it is the debtor's duty to see that he has such evidence of his authority, otherwise he runs the risk of having to pay a second time to the client. The attorney's authority to receive payment on such security ceases on his parting with the possession of the same, although he does so unlawfully, and without the knowledge of his client. Payments subsequently made to him upon this false assumption that he still retains possession of the security are not operative.²⁴⁷ And the mere fact that the attorney has negotiated the loan, or transacted the business, for which the securities were given, does not make an exception to this rule.²⁴⁸ But where the client permits the attorney to retain possession of the security, and such fact is known by the lender, although the client has withdrawn the attorney's authority, or has told the debtor not to pay to him, the attorney still has implied authority to receive payment therefrom. Thus where an attorney negotiated a loan for the mortgagor, and the latter permitted him to retain the bond and

Davis v. Severance, 49 Minn. 529.

Nolan v. Jackson, 16 Ill. 272.

Central Trust Co. v. Folsom, 26 App. Div. (N. Y.) 40.

Hudson v. Johnson, 1 Wash. (Va.) 9; *Patten v. Fullerton*, 101 N. Y. 58; *Whelan v. Reilly*, 61 Mo. 565; *Orient Ins. Co. v. Hayes*, 100 N. Y. 173; *Williams v. Walker*, 2 Sandf. Ch. (N. Y.) 325; *Smith v. Kidd*, 68 N. Y. 130, 23 Am. Rep. 157.

Crane v. Gruenewald, 120 N. Y. 274, 17 Am. St. Rep. 643; *Williams v. Walker*, 2 Sandf. Ch. (N. Y.) 325; *Patten v. Fullerton*, 27 App. Div. (N. Y.) 33.

Henn v. Conisby, Ch. Cas. 93; *Smith v. Kidd*, 68 N. Y. 130, 23 Am. Rep. 157.

mortgage after the principal was due, and the mortgagor had knowledge of that fact, he had implied authority to receive payment thereon, and payment made to him by the mortgagor, relying on his authority, was good.²⁴⁹

The mere possession, however, of the securities by the attorney is not sufficient. The party making the payment must have knowledge of that fact. It would not avail such party to prove that, subsequent to a payment, he discovered that the securities were in the actual custody of the attorney when it was made. For he could not have been misled by a fact the existence of which was unknown to him. It is the information which he acquires of the possession which apprises him that the attorney has apparent authority to act for the principal. It is the appearance of authority to collect, furnished by the custody of the securities, which justifies him in making payment. And it is because the party acts in reliance upon such appearance—an appearance made possible only by the act of the owner in leaving the securities in the hands of the attorney—that estops the owner from denying the existence of authority in the attorney which such possession indicates. So if an attorney is given apparent authority to receive payment of a bond and mortgage by the fact he negotiated the loan, and they are by the mortgagee left in his possession, there is no presumption that this authority or possession continues; and every time the mortgagee makes a payment to such attorney, he must ascertain that the bond and mortgage remain in his possession.²⁵⁰ But it is not necessary that the party making the payment should see the security if, upon inquiry, he was informed that it was still in possession of the attorney, and such information was true.²⁵¹

Authority to receive payment necessarily carries with it an incidental power to give to the debtor, upon payment, such receipts or evidences of the debt as he is entitled to receive.²⁵²

²⁴⁹ *Crane v. Gruenewald*, 120 N. Y. 274, 17 Am. St. Rep. 643; *Whelan v. Reilly*, 61 Mo. 565; *Williams v. Walker*, 2 Sandf. Ch. (N. Y.) 325.

²⁵⁰ *Crane v. Gruenewald*, 120 N. Y. 274, 17 Am. St. Rep. 643.

²⁵¹ *Crane v. Gruenewald*, 120 N. Y. 274, 17 Am. St. Rep. 643.

²⁵² *Padfield v. Green*, 85 Ill. 529; *Miller v. Scott*, 21 Ark. 396.

Claims in court.—This authority does not refer mere-
 ses or claims out of court, before a suit has begun,
 attorney may receive payment as well after the suit
 commenced as before.²⁵³ And even after judgment, as
 authority of the attorney of record continues, as shall be
 hereafter, for many purposes, he may receive payment
 judgment debt and enter satisfaction on the record.²⁵⁴
 The payment of a judgment or decree to the attorney
 who obtained it, before his authority is revoked,
 the notice of such revocation given to the defendant,
 and binding on the plaintiff, so far, at least, as the
 client is concerned.²⁵⁵ Payment to the attorney is bind-
 ing on the client, although made by a stranger, and when
 payment is made, the attorney is authorized to deliver
 up the judgment or discharge of the judgment to the debtor.²⁵⁶
 This rule does not apply to an attorney who is not the
 attorney of record in the case, but has been employed in the
 case for some special purpose, as to argue the case,
 to take evidence or to assist in some way in the trial.²⁵⁷

Release or discharge.—This power, however, to receive
 payment, does not give the attorney power to release or dis-
 charge the client's judgment or claim without actual payment

Wright v. Cunningham, 39 Me. 386.

Wright v. Blake, 8 Pet. (U. S.) 17, 26; *Frazier v. Parks' Adm'rs*,
 363; *Miller v. Scott*, 21 Ark. 396; *Conway County v. Lit-
 tle & Ft. S. R. Co.*, 39 Ark. 50; *Black v. Drake*, 2 Colo. 330;
Wright v. Norton, 4 Conn. 517, 10 Am. Dec. 179; *Cameron v. Strat-
 ton*, 14 Ill. App. 270 (but not if he is not an attorney of record);
Harvie, 31 Ill. 62, 83 Am. Dec. 202; *McCarver v. Nealey*,
 36 Ind. (Iowa) 360; *Ely v. Harvey*, 6 Bush (Ky.) 620; *White
 v. Norton*, 67 Me. 287; *Baltimore & O. R. Co. v. Fitzpatrick*, 36
 Mo. 366; *Wyckoff v. Bergen*, 1 N. J. 214; *Rogers v. McKenzle*,
 81 N. C. 164; *McDonald v. Todd*, 15 Pa. 63; *Mordecai v.
 Jones' Adm'r*, 13 Tex. 1; *Yoakum v. Tilden*, 3 W. Va. 167,
 100 Am. Dec. 738; *Harper v. Harvey*, 4 W. Va.

Yoakum v. Tilden, 3 W. Va. 167, 100 Am. Dec. 738.

Miller v. Scott, 21 Ark. 396.

Cameron v. Stratton, 14 Ill. App. 270.

& S.—90.

or satisfaction in full,²⁵⁸ nor to assign a decree for less than the full amount.²⁵⁹ But while an attorney has no right, as between the parties, to enter satisfaction of a judgment without the actual receipt of the money due on it, yet where the rights of third persons intervene, a subsequent purchaser for value of the property affected by such judgment will be protected, even though it be afterwards made to appear that the satisfaction was improperly made.²⁶⁰

(e) **When power ceases.**—The attorney's power to receive payment arises as a consequence of his power to collect, and where by any means he loses the latter power the former necessarily ceases with it. Thus, when the relation of attorney and client ceases, his power to receive payment in satisfaction of a debt or claim also ceases.²⁶¹ So if the power to collect is withdrawn the power to receive payment likewise ceases. It is the duty of the debtor, before he makes payment of his debt to an attorney, to see that the latter has the proper authority to receive such payment. But, however, if the client has held the attorney out as possessing the

²⁵⁸ *Robinson v. Murphy*, 69 Ala. 543; *Hall Safe & Lock Co. v. Harwell*, 88 Ala. 441; *Whiting v. Beebe*, 12 Ark. 421; *McMurray v. Marsh*, 12 Colo. App. 95; *Phillips v. Dobbins*, 56 Ga. 617; *Miller v. Lane*, 13 Ill. App. 648; *People v. Cole*, 84 Ill. 327; *Bigler v. Toy*, 61 Iowa, 687; *Martin v. Capital Ins. Co.*, 85 Iowa, 643; *Cottrell v. Wheeler*, 89 Iowa, 754; *Rounsaville v. Hazen*, 33 Kan. 71; *Harrow v. Farrow's Heirs*, 7 B. Mon. (Ky.) 126, 45 Am. Dec. 60; *Phelps v. Preston*, 9 La. Ann. 488; *Jewett v. Wadleigh*, 32 Me. 110; *Wilson v. Wadleigh*, 36 Me. 496; *Doub v. Barnes*, 1 Md. Ch. 127; *Maddux v. Bevan*, 39 Md. 485; *Rohr v. Anderson*, 51 Md. 205; *Parker v. McBee*, 61 Miss. 134; *Vanderline v. Smith*, 18 Mo. App. 55; *Robert v. Nelson*, 22 Mo. App. 28; *Faughnan v. Elizabeth*, 58 N. J. Law 309; *Beers v. Hendrickson*, 45 N. Y. 665; *Mandeville v. Reynolds*, 68 N. Y. 528, 540; *De Mets v. Dagron*, 53 N. Y. 635; *Wood v. City of New York*, 44 App. Div. (N. Y.) 299; *Wilson v. Jennings*, Ohio St. 528; *Chambers v. Miller*, 7 Watts (Pa.) 63; *Gilliland v. Gasque*, 6 S. C. 406; *Commissioners of Public Accounts v. Rose*, Desaus. (S. C.) 461; *Peters v. Lawson*, 66 Tex. 336; *Vail v. Conant*, 15 Vt. 314; *Watt v. Brookover*, 35 W. Va. 323, 29 Am. St. Rep. 811; *Crotty v. Eagle's Adm'r*, 35 W. Va. 151; *Kelly v. Wright*, 65 Wis. 230.

²⁵⁹ *Rice v. Troup*, 62 Miss. 186.

²⁶⁰ *Wheeler v. Alderman*, 34 S. C. 533, 27 Am. St. Rep. 842.

²⁶¹ *Ruckman v. Alwood*, 44 Ill. 183.

to collect for him, the debtor or any third person might to rely on such authority, and will be protected makes payment to the attorney at any time before he gives notice that such authority is withdrawn.²⁶² But if the third person makes a payment to the attorney after he gives notice by the client that the attorney's authority is withdrawn, or not to pay to him, such payment is not binding on the client.²⁶³

What he may receive in payment.

An attorney employed to collect a claim or money judgment has no implied authority to receive anything but lawfully due in payment thereof,²⁶⁴ although something else

Bank v. Tilden, 3 W. Va. 167, 100 Am. Dec. 738.

Bank v. Lee, 3 Yeates (Pa.) 47.

Bank v. Life Interests & Reversionary Securities Corp., 111 F. Ch. 127, 75 Law T. (N. S.) 627; *Gullett v. Lewis*, 3 Stew. & 3; *West v. Ball*, 12 Ala. 340; *Moore v. Murrell*, 56 Ark. 330; *Drake v. Drake*, 2 Colo. 330; *Jeter v. Haviland*, 24 Ga. 252; *Green v. Green*, 85 Ill. 529; *Lochenmeyer v. Fogarty*, 112 Ill. 572; *Jackson*, 16 Ill. 272; *McCormick v. Walter A. Wood M. & Co.*, 72 Ind. 518; *Bigler v. Toy*, 68 Iowa, 687; *McCarver v. Greene* (Iowa) 360; *Herriman v. Shomon*, 24 Kan. 261; *Dolan v. Van Demark*, 35 Kan. 304; *Smith v. Mon.* (Ky.) 405; *Givens v. Briscoe*, 3 J. J. Marsh. 4; *Ralley v. Bagley*, 19 La. Ann. 172; *Perkins v. Grant*, 2 La. 328; *Phelps v. Preston*, 9 La. Ann. 488; *Lord v. Burbank*, 78; *Maddux v. Bevan*, 39 Md. 485; *Kent v. Ricards*, 3 Md. 1; *Pitkin v. Harris*, 69 Mich. 133; *Hurley v. Watson*, 68 Miss. 1; *Mangum v. Ball*, 43 Miss. 288, 5 Am. Rep. 488; *Hoopes v. Smith*, 26 Miss. 428; *Coopwood v. Baldwin*, 25 Miss. 129; *Van v. Smith*, 18 Mo. App. 55; *Spears v. Ledergerber*, 56 Mo. 1; *Smith v. Jones*, 47 Neb. 108, 53 Am. St. Rep. 519; *Cram v. Neb.* 828, 66 Am. St. Rep. 478; *Lewis v. Woodruff*, 15 N. Y. 539; *Moye v. Cogdell*, 69 N. C. 93; *Ely v. Lamb*, 10 Ct. R. 209; *Huston v. Mitchell*, 14 Serg. & R. (Pa.) 307, Dec. 506; *Commissioners of Public Accounts v. Rose*, 1 De. C. 461; *Mayer v. Blease*, 4 Rich. (S. C.) 10; *Maxwell v. Cold*, (Tenn.) 630; *Baldwin v. Merrill*, 8 Humph. (Tenn.) 1; *Davidson v. Baxt*, (Tenn.) 47; *Wright v. Dally*, 26 Tex. 412; *Arnold v. Arnold*, 33 Tex. 412; *Anderson v. Boyd*, 64 Tex. 108; *Holloway v. Leigh* (Va.) 277; *Wiley v. Mahood*, 10 W. Va. 485; *Kent v. Chapman*, 18 W. Va. 485.

apparently or in fact more valuable might have been traded for the claim.²⁶⁵ Thus he cannot receive land in satisfaction of a money judgment,²⁶⁶ nor money or any other thing in satisfaction of a judgment for land.²⁶⁷ Nor may he receive a bond in satisfaction of a judgment,²⁶⁸ nor an assignment of one judgment in satisfaction of another;²⁶⁹ nor the note of the debtor or third person,²⁷⁰ though it has been held that an attorney, who has a note for collection, may receive part payment in money, and a note for a short period for the balance, if the party is of unquestioned responsibility.²⁷¹ Nor may the attorney receive in payment a draft payable in the future,²⁷² nor the note of one party in satisfaction of joint and several notes,²⁷³ nor can he receive in payment a county warrant,²⁷⁴ nor Confederate notes;²⁷⁵ nor depreciated money or paper of any kind.²⁷⁶ As has been said

²⁶⁵ *Herriman v. Shomon*, 24 Kan. 387, 36 Am. Rep. 262.

²⁶⁶ *Huston v. Mitchell*, 14 Pa. 88; *Stackhouse v. O'Hara's Ex'rs*, 14 Pa. 88; *Stokely v. Robinson*, 34 Pa. 315; *Kirk's Appeal*, 87 Pa. 243, 30 Am. Rep. 357; *Walden v. Bolton*, 55 Mo. 405; *Hoopes v. Burnett*, 26 Miss. 428.

²⁶⁷ *Harrow v. Farrow's Heirs*, 7 B. Mon. (Ky.) 126, 45 Am. Dec. 60.

²⁶⁸ *Smock v. Dade*, 5 Rand. (Va.) 639, 16 Am. Dec. 780; *Kirk v. Glover*, 5 Stew. & P. (Ala.) 340; *McClintock v. Helberg*, 168 Ill. 384.

²⁶⁹ *Clark v. Kingsland*, 1 Smedes & M. (Miss.) 248.

²⁷⁰ *Jeter v. Haviland*, 24 Ga. 252; *Lochenmeyer v. Fogarty*, 11 Ill. 572; *Jones v. Ransom*, 3 Ind. 327; *Langdon v. Potter*, 13 Mass. 319; *Garvin v. Lowry*, 7 Smedes & M. (Miss.) 24; *Houx v. Russell*, 10 Mo. 246; *Heyman v. Berlinger*, 1 Abb. N. C. (N. Y.) 315; *Finlay v. Heyward*, 35 Misc. (N. Y.) 266; *Baldwin v. Merrill*, 8 Humph. (Tenn.) 132.

²⁷¹ *Livingston v. Radcliff*, 6 Barb. (N. Y.) 201.

²⁷² *Moye v. Cogdell*, 69 N. C. 93; *Portis v. Ennis*, 27 Tex. 574.

²⁷³ *Miller v. Edmonston*, 8 Blackf. (Ind.) 291.

²⁷⁴ *Herriman v. Shomon*, 24 Kan. 387, 36 Am. Rep. 261.

²⁷⁵ *Harper v. Harvey*, 4 W. Va. 539; *Railey v. Bagley*, 19 La. Ann. 172; *Davis v. Lee*, 20 La. Ann. 248; *Clark v. Thomas*, 4 Heisk. (Tenn.) 419. See, also, *Johnson v. Gibbons*, 27 Grat. (Va.) 632.

²⁷⁶ *Chapman v. Cowles*, 41 Ala. 103, 91 Am. Dec. 508; *West v. Ball*, 12 Ala. 340; *Lawson v. Bettison*, 12 Ark. 401; *Walker v. Scott*, 13 Ark. 648; *Trumbull v. Nicholson*, 27 Ill. 149; *Commissioners of Public Accounts v. Rose*, 1 Desaus. (S. C.) 464; *Gasquet v. Warren*, 2 Smedes & M. (Miss.) 514; *Moye v. Cogdell*, 69 N. C. 93; *Wickliffe v. Davis*, 2 J. J. Marsh. (Ky.) 69.

debtor cannot discharge himself by a payment in any-
 else than gold and silver, without the consent of his
 rs; nor does the mandate of a fieri facias require of the
 to make of the defendant's estate anything else than
 silver. And if he accepts bank bills which are sell-
 a discount, neither himself nor the attorney of the
 f can compel the latter to receive them as money."²⁷⁷
 n an attorney set off or credit, on his client's claim or
 nt, a debt due by himself to the debtor, nor transfer
 nt's securities in satisfaction of such debt.²⁷⁸ The
 ay, however, ratify the attorney's unauthorized act in
 g something other than money on payment of the
 Thus, if the client indorses a check received by his
 y in payment of a judgment, and receives the money
 , with a knowledge of all the facts, he thereby ratifies
 rney's act in receiving such payment.²⁷⁹

Attorney's power over or after judgment.

s been laid down as a general rule that the authority
 ttorney ceases upon the entry of final judgment;²⁸⁰
 ast with its execution within a year.²⁸¹ Where such
 tains after final judgment has been entered, the at-
 has no authority, by virtue of his original retainer,
 nt to set it aside.²⁸² If, however, the judgment has

the court in *West v. Ball*, 12 Ala. 346.

gston v. Kincaid, 1 Wash. C. C. 454, Fed. Cas. No. 7,822;
Genette, 1 Port. (Ala.) 212; *Gullett v. Lewis*, 3 Stew. (Ala.)
g v. Ely, 5 Stew. & P. (Ala.) 354; *Chapman v. Burt*, 77
Hicky v. Sharp, 4 La. (O. S.) 335; *Nolan v. Rogers*, 4
 N. S.; La.) 145; *Keller v. Scott*, 2 Smedes & M. (Miss.)
ans v. Lindsey, 1 How. (Miss.) 577; *Hamrick v. Combs*,
 381; *Child v. Dwight*, 21 N. C. (1 Dev. & B. Eq.) 171;
s v. Miller, 7 Watts (Pa.) 63; *Bosler v. Searight*, 149 Pa.
kinson v. Holloway, 7 Leigh (Va.) 277; *Wiley v. Mahood*,
 a. 206.

erson v. McGovern, 44 App. Div. (N. Y.) 310.

ler v. Knight, L. R. 2 Exch. 109, 113; *Macbeath v. Ellis*,
 578; *Hillegaas v. Bender*, 78 Ind. 225; *Berthold v. Fox*, 21

kson v. Bartlett, 8 Johns. (N. Y.) 281.

bert v. Montgomery's Adm'rs, 5 Dana (Ky.) 11; *Quinn v.*
Rob. (N. Y.) 538.

been entered by default he may consent to its being opened, although contrary to his client's instructions, if it has been entered under such circumstances that the court, of itself, would open it.²⁸³

Whilst this was the rule at common law, the more modern rule now is otherwise. It seems to be now generally conceded in this country that the authority of an attorney at law over his client's cause continues not only until judgment is recovered and a year and a day afterwards, as was the rule in the old books;²⁸⁴ but if the judgment be not satisfied and is continued in force, his authority will be prolonged accordingly for the purpose of enforcing it.²⁸⁵ In order to render the judgment effectual he may institute all supplementary proceedings necessary therefor,²⁸⁶ as a *scire facias*;²⁸⁷ or demand payment of an administrator, pursuant to statute;²⁸⁸

²⁸³ *Anon.*, 1 Wend. (N. Y.) 108; *Clussman v. Merkel*, 3 Bosw. (N. Y.) 402; *Read v. French*, 28 N. Y. 285.

²⁸⁴ *Pennington's Ex'rs v. Yell*, 11 Ark. 212, 52 Am. Dec. 262; *Berthold v. Fox*, 21 Minn. 51, 53.

²⁸⁵ *Pennington's Ex'rs v. Yell*, 11 Ark. 212, 52 Am. Dec. 262; *Miller v. Scott*, 21 Ark. 396; *Conway County v. Little Rock & Ft. S. R. Co.*, 39 Ark. 50; *Frazier v. Parks' Adm'rs*, 56 Ala. 363; *McCarver v. Nealey*, 1 G. Greene (Iowa) 360; *Smith v. Cunningham*, 59 Kan. 552; *Gray v. Wass*, 1 Me. 257; *White v. Johnson*, 67 Me. 287; *Wyckoff v. Bergen*, 1 N. J. Law, 214; *Rogers v. McKenzie*, 8 N. C. 164; *Yoakum v. Tilden*, 3 W. Va. 167. As was said in *Smyth v. Harvie*, 31 Ill. 62, 83 Am. Dec. 202: "Whilst by the rules of the ancient common law it was no part of an attorney's duty to receive money on a judgment, yet in more modern times attorneys have become collecting agents as well as lawyers. By uniform custom and practice, attorneys engage in and attend to the collection of money as a part of their professional duty. Such is inseparable from the practice at the present day. It is not reasonable to suppose that either party imagined, at the time of this retainer, that the duty of the defendants ceased when they obtained the judgment on the plaintiff's claim."

²⁸⁶ *Ward v. Roy*, 69 N. Y. 96; *Heard v. Lodge*, 20 Pick. (Mass.) 53, 32 Am. Dec. 197.

²⁸⁷ *Nichols v. Dennis*, R. M. Charlt. (Ga.) 188; *Dearborn v. Dearborn*, 15 Mass. 316 (it is his duty to do so).

²⁸⁸ *Heard v. Lodge*, 20 Pick. (Mass.) 53, 32 Am. Dec. 197; *Conner v. sheriff*, *Spence v. Rutledge*, 11 Ala. 557.

When necessary he may issue an alias.²⁸⁹ He may after judgment, by virtue of his general retainer, sue out execution on the writ of process and receive the money collected thereon;²⁹⁰ but he cannot sue out such execution against his client's land, nor have execution levied on land conveyed as security before it is reconveyed to the debtor.²⁹² So the plaintiff's attorney may direct the sheriff or other officer as to the time and manner of enforcing the execution;²⁹³ or even direct the sheriff to depart from his regular course of issuing such process;²⁹⁴ or agree to delay issuance of execution for a limited time;²⁹⁵ or stay proceedings under it for a reasonable time;²⁹⁶ or direct return thereon to be deferred if it will not be detrimental to the judgment lien;²⁹⁷ or direct a sale under it to be suspended,²⁹⁸ or postponed;²⁹⁹

Beaver v. Mirrick, 2 N. H. 376.

Story v. Chapman, 11 Adol. & E. 829; *Erwin v. Blake*, 8 Pet. 18; *Union Bank v. Geary*, 5 Pet. (U. S.) 98; *Conway County v. Rock & Ft. S. R. Co.*, 39 Ark. 50; *Black v. Drake*, 2 Colo. 1; *Chckett v. Norton*, 4 Conn. 517, 10 Am. Dec. 179; *Canterberry v. Dana* (Ky.) 415; *White v. Johnson*, 67 Me. 287; *Farmers' & Merchants' Bank v. Mackall*, 3 Gill (Md.) 447; *Parker v. Downing*, 13 Mass. 1; but not where his authority has been revoked before payment to the sheriff; *McDonald v. Todd*, 1 Grant Cas. (Pa.) 17; *Gist v. McCord* (S. C.) 259; *Hyams v. Michel*, 3 Rich. Law Rep. 303; *Wilson v. Stokes*, 4 Munf. (Va.) 455.

Parker v. St. Quintin, 12 Mees. & W. 441.

Parker v. Home Mut. Bldg. & Loan Ass'n, 114 Ga. 702.

Erwin v. Blake, 8 Pet. (U. S.) 25; *Smith v. Gayle*, 58 Ala. 1; *Chckett v. Norton*, 4 Conn. 517, 10 Am. Dec. 179; *State v. French*, 46 Ind. 428; *Stevens v. Colby*, 46 N. H. 163; *Read v. French*, 17 Am. Dec. 285; *Gorham v. Gale*, 7 Cow. (N. Y.) 739, 17 Am. Dec. 1; *French v. Commonwealth*, 16 Serg. & R. (Pa.) 368, 16 Am. Dec. 1; *Clard v. Goodrich*, 31 Vt. 597; *Kimball v. Perry*, 15 Vt. 414. *Downing v. Sutherland*, 3 Hill (N. Y.) 552; *White v. Johnson*, 67 Me. 287.

Downing v. White, 109 Mass. 392; *White v. Johnson*, 67 Me. 287; *White v. Ely*, 3 Watts & S. (Pa.) 420.

Downing v. White, 109 Mass. 392; *White v. Johnson*, 67 Me. 287.

Clure v. Colclough, 5 Ala. 65; *Crenshaw v. Harrison*, 8 Ala. 1.

Parker v. Goodman, 21 Ala. 647.

French v. Com., 16 Serg. & R. (Pa.) 368, 16 Am. Dec. 582.

Pertson v. Goldsby, 28 Ala. 711, 65 Am. Dec. 380.

or he may receive seisin of land taken by the sheriff in execution.³⁰⁰ So he may assent to the correction of a mere clerical error in a judgment or decree.³⁰¹

But he is not authorized to bid, or to authorize anyone else to bid, for his client at an execution sale;³⁰² nor has he authority to direct what particular property shall be levied on under his client's execution;³⁰³ although he may authorize goods levied on to be sold, if perishable, and the proceeds kept for future distribution.³⁰⁴ Nor is he authorized, on his own motion, to commence affirmative proceedings to keep alive a judgment which he has for collection.³⁰⁵ Nor has he authority to release the defendant from imprisonment on execution, without satisfaction;³⁰⁶ nor to release property bound by his client's judgment, without the latter's knowledge or consent;³⁰⁷ nor to postpone his client's lien until

³⁰⁰ *Pratt v. Putnam*, 13 Mass. 361, 363.

³⁰¹ *Hill v. Bowyer*, 18 Grat. (Va.) 364.

³⁰² *Averill v. Williams*, 4 Denio (N. Y.) 295, 47 Am. Dec. 252; *Beardsley v. Root*, 11 Johns. (N. Y.) 464, 6 Am. Dec. 386 (he cannot purchase land sold under an execution in favor of his client, either in trust, or for the benefit of his client); *Washington v. Johnson*, 7 Humph. (Tenn.) 468; *Savery v. Sypher*, 6 Wall. (U. S.) 157. See, also, *Wade v. Pettibone*, 11 Ohio, 57, 37 Am. Dec. 408; *Leisenring v. Black*, 5 Watts (Pa.) 303, 30 Am. Dec. 322.

³⁰³ *Averill v. Williams*, 4 Denio (N. Y.) 295, 47 Am. Dec. 252; *Welch v. Cochran*, 63 N. Y. 181, 20 Am. Rep. 521; *Oestrich v. Gilbert*, 9 Hun (N. Y.) 244.

³⁰⁴ *Nelson v. Cook*, 19 Ill. 440.

³⁰⁵ *Cullison v. Lindsay*, 108 Iowa, 124.

³⁰⁶ *Savery v. Chapman*, 11 Adol. & E. 829, 8 Dowl. 656; *Connop v. Challis*, 2 Exch. 484, 17 Law J. Exch. 319; *Lewis v. Gamage*, 1 Pick. (Mass.) 347; *Kellogg v. Gilbert*, 10 Johns. (N. Y.) 220, 4 Am. Dec. 335; *Jackson v. Bartlett*, 8 Johns. (N. Y.) 281; *Crary v. Turner*, 6 Johns. (N. Y.) 51; *Simonton v. Barrell*, 21 Wend. (N. Y.) 362; *Treasurers v. McDowell*, 1 Hill (N. Y.) 184, 26 Am. Dec. 166. But see *Hopkins v. Willard*, 14 Vt. 474; *Scott v. Seller*, 1 Watts (Pa.) 235.

³⁰⁷ *Phillips v. Dobbins*, 56 Ga. 617; *Holbert v. Montgomery*, 1 Dana (Ky.) 11; *Harrow v. Farrow's Heirs*, 7 B. Mon. (Ky.) 12; 45 Am. Dec. 60; *Horsey v. Chew*, 65 Md. 555; *Fritchey v. Bosley*, 56 Md. 94; *Doub v. Barnes*, 1 Md. Ch. 127; *Banks v. Evans*, 1 Smedes & M. (Miss.) 35, 48 Am. Dec. 734; *Wilson v. Jennings*, 1 Ohio St. 528; *Kirk's Appeal*, 87 Pa. 243, 30 Am. Rep. 357; *E*

her one has been satisfied.³⁰⁸ He cannot release prop-
erty from the levy of an execution;³⁰⁹ nor agree to a stay of
execution, if it will destroy his client's lien;³¹⁰ nor may he
assign a judgment recovered by him in favor of his
client;³¹¹ nor agree to suspend the proceedings on a judg-
ment;³¹² nor may he move to set aside or reverse a judgment,
if he was employed merely to prosecute the action to
judgment.³¹³

But even under the modern cases it seems to be the rule
that the attorney cannot begin proceedings for an appeal
on a judgment, without further authority from his
client,³¹⁴ although some of the cases hold that he may.³¹⁵

Wamb, 10 Pa. Co. Ct. R. 209; *Dollar Sav. Bank v. Robb*, 4
St. (Pa.) 106; *Ludden v. Sumter*, 45 S. C. 186, 25 Am. St.
761.

Fritchey v. Bosley, 56 Md. 96; *Phillips v. Dobbins*, 56 Ga.

Banks v. Evans, 10 Smedes & M. (Miss.) 35, 48 Am. Dec.
Jackson v. Bartlett, 8 Johns. (N. Y.) 281; *Benedict v. Smith*,
126 (N. Y.) 126; *Jewett v. Wadleigh*, 32 Me. 110.

Reynolds v. Ingersoll, 11 Smedes & M. (Miss.) 249, 49 Am.
57; *Union Bank v. Govan*, 10 Smedes & M. (Miss.) 343; *Silvis*
v. *Watts & S.* (Pa.) 420 (it is within his power to stay
execution upon the promise of a third person to pay the debt).

Boren v. McGehee, 6 Port. (Ala.) 432, 31 Am. Dec. 695; *Gard-
ner v. Mobile & N. W. R. Co.*, 102 Ala. 635, 48 Am. St. Rep. 84;
Sparks, 3 Kan. App. 602; *Smiley v. United States Bldg.*
Ass'n's Assignee, 23 Ky. L. R. 250, 62 S. W. 853; *Walden*
Ant., 8 Mart. (N. S.; La.) 565; *Wilson v. Wadleigh*, 36 Me. 496;
Kingsland, 1 Smedes & M. (Miss.) 256; *Rice v. Troup*,
186; *Head v. Gervais*, Walk. (Miss.) 431, 12 Am. Dec. 577;
Fromme, 70 Mo. App. 613; *Henry & Coatsworth Co. v.*
Neb., 58 Neb. 685; *Fassitt v. Middleton*, 47 Pa. 214, 86 Am. Dec.
Campbell's Appeal, 29 Pa. 401, 72 Am. Dec. 641; *Basler v. Sea-*
149 Pa. 241; *Noonan v. Gray's Ex'rs*, 1 Bailey (S. C.) 437;
Blease, 4 Rich. (S. C.) 10; *Maxwell v. Owen*, 7 Cold.
630; *Baldwin v. Merrill*, 8 Humph. (Tenn.) 132. But
if the client receives the money on such assignment, he will
be presumed to have authorized or ratified the act. *Marshall v.*
Ill., 36 Ill. 321.

Pendexter v. Vernon, 9 Humph. (Tenn.) 84.

Richardson v. Talbot, 2 Bibb (Ky.) 382.

Riddle v. Hanna, 25 Ala. 484; *Commissioners of Roads v. Griffin*
P. Plank-Road Co., 9 Ga. 487; *Covill v. Phy*, 24 Ill. 37; *Hopkins*

It seems, however, that the foregoing rules apply only to the attorney for the plaintiff. "Neither the common law nor any statute continues after judgment the authority of the attorney for the defeated party, the judgment debtor, or the defendant in the judgment, as he is aptly styled." Thus the employment of an attorney to defend a suit does not authorize him to receive from the sheriff the proceeds of the defendant's property sold under judgment in his suit.³¹⁶ So it is held that the general power and liability of an attorney for a defendant cease upon the entry of a judgment finally terminating the litigation, and do not include the payment of the judgment, although he be furnished with money for the purpose.³¹⁷

§ 651. Attorney's power to delegate authority.

(a) **In general.**—A familiar and general rule of law applicable to the relation of principal and agent is that the agent cannot delegate the authority conferred upon him to another—*delegatus non potest delegare*—so that the principal will be bound by the acts done in the discretion of one to whom the agent attempts to delegate his authority. There is no rule excepting from the operation of this doctrine any attorney at law, whose duties, responsibilities and liabilities arise from the relation of agency existing between him and his client.³¹⁸ An attorney is retained by his client, because of the trust and confidence the latter has in that particular attorney to transact the business for which he is employed. Ha

v. Mallard, 1 G. Greene (Iowa) 117; *Ikerd v. Borland*, 35 La. Ann. 337; *National Park Bank v. Lanahan*, 60 Md. 477; *Delaney v. Hubbard*, 64 N. J. Law, 275; *Coles v. Anderson*, 8 Humph. (Tenn.) 489; *Hooker v. Village of Brandon*, 75 Wis. 8.

³¹⁵ *Grosvenor v. Danforth*, 16 Mass. 74; *Nisbet v. Lawson*, 1 G. 280; *Woodmen of the World v. Rutledge*, 133 Cal. 640; *Ricketts v. Torres*, 23 Cal. 636; *Connett v. Chicago*, 114 Ill. 233; *Norbert v. Heineman*, 59 Mich. 210 (from justice's to circuit court); *Appeal of Spaulding*, 33 N. H. 479 (from probate court); *Hallam Tillingham*, 19 Wash. 20.

³¹⁶ *Germaine v. Mallerich*, 31 La. Ann. 371. See *Welsh v. Corran*, 63 N. Y. 181, 20 Am. Rep. 519.

³¹⁷ *Hillegass v. Bender*, 78 Ind. 225.

³¹⁸ *Antrobus v. Sherman*, 65 Iowa, 230, 54 Am. Rep. 7.

entertained the same trust and confidence in another attorney he probably would have employed him. But since he retained the particular attorney, it is the latter's duty to attend to and conduct his client's business in person, and not to entrust to another that which was so confidentially entrusted to him.³¹⁹

It may, therefore, be stated as a general rule, that an attorney cannot delegate to another those powers conferred upon him which involve judgment or discretion, or which depend upon his personal skill or ability, without the express or implied consent of his client.³²⁰ Thus an agreement by an attorney to turn over to another attorney notes which he holds for collection is invalid.³²¹ If a client gives a note or claim to an attorney for collection and the attorney employs another to do it for him, there is no privity of contract between the client and the latter attorney, so payment to him is not to be payment to the client unless actually received by him;³²² nor will the client be liable for costs incurred in an attempt to collect;³²³ and if any loss is sustained by the

Dickson v. Wright, 52 Miss. 585, 24 Am. Rep. 677; *Smalley v. Greene*, 52 Iowa, 241, 35 Am. Rep. 267.

Johnson v. Cunningham, 1 Ala. 249; *Hithcock v. McGehee*, 7 Ala. 556; *Kellogg v. Norris*, 10 Ark. 18; *Danley v. Crawl*, 28 Ark. 95; *Porter v. Elizalde*, 125 Cal. 204; *Morgan v. Roberts*, 110 Cal. 65; *Sloan v. Williams*, 138 Ill. 43; *Clegg v. Baumberger*, 110 Ill. 536; *O'Conner v. Arnold*, 53 Ind. 203; *Smalley v. Greene*, 52 Iowa, 241, 35 Am. Rep. 267; *Antrobus v. Sherman*, 65 Iowa, 230, 54 Am. Rep. 7; *Dickson v. Wright*, 52 Miss. 585, 24 Am. Rep. 677; *Hilton v. Crooker*, 30 Neb. 707; *Buckley v. Buckley*, 64 N. Y. 632; *Ratcliff v. Baird*, 14 Tex. 43; *Crotty v. Eagle's Nest*, 35 W. Va. 143. See *Planters' Bank v. Massey*, 2 Helsk. (N. Y.) 360, where it was held that the attorney may delegate the collection of a bill of exchange to another, where inconvenient or impracticable for him to collect in person, and it was the usage and custom to employ another attorney in such cases.

Smalley v. Greene, 52 Iowa, 241, 35 Am. Rep. 267.

Kellogg v. Norris, 10 Ark. 18; *Danley v. Crawl*, 28 Ark. 95; *Dickson v. Wright*, 52 Miss. 585, 24 Am. Rep. 677, and such payment does not discharge the debtor, but he will still be liable to the owner of the note for the full amount of the note.

Antrobus v. Sherman, 65 Iowa, 230, 54 Am. Rep. 7; *Hoover*

client by the acts of the latter attorney, the former one will be liable therefor, where he has receipted the note "for collection."³²⁴ If one attorney confides a note to another for collection, and takes his receipt, but without giving instructions with respect to ownership, and after the money is collected, it is remitted to the payee of the note, whose name, however, was endorsed on the note, this remittance, the payee not being the owner, will not discharge the collecting attorney from liability to his immediate principal.³²⁵ So an attorney of record of a party in whose favor execution on a judgment has issued has no authority to authorize a clerk of the circuit court, in his official capacity, and standing in no previous relationship of agency to the attorney or judgment creditor, to accept money on the judgment.³²⁶ So an attorney employed to argue a case cannot delegate his power to another.³²⁷

(b) **Authority to delegate or ratification.**—The client may, however, expressly or impliedly authorize the attorney to employ a substitute or he may subsequently ratify a delegation previously made, and in either event the attorney delegated will be the attorney of the client.³²⁸ If the client had knowledge of a delegation of authority by his attorney, and said nothing in dissent thereto, but permitted the substitute to act, he will be deemed to have assented to or ratified such delegation.³²⁹ So where for any reason the attorney becomes unable to discharge his duties, it seems that it would not necessarily be illegal or void for him to employ

v. Greenbaum, 61 N. Y. 305; *Dickson v. Wright*, 52 Miss. 585, 24 Am. Rep. 677.

³²⁴ *Cummins v. McLain*, 2 Ark. 402; *Walker v. Stevens*, 79 Ill. 193; *Abbott v. Smith*, 4 Ind. 452; *Pollard v. Rowland*, 2 Blackf. (Ind.) 22; *Cummins v. Heald*, 24 Kan. 600, 36 Am. Rep. 264; *Wilkinson v. Griswold*, 12 Smedes & M. (Miss.) 669; *Bradstreet v. Everson*, 72 Pa. 124, 13 Am. Rep. 665; *Morgan v. Tener*, 83 Pa. 305.

³²⁵ *Lewis v. Peck*, 10 Ala. 142.

³²⁶ *Hendry v. Benlisa*, 37 Fla. 609.

³²⁷ *Eggleston v. Boardman*, 37 Mich. 14.

³²⁸ *Eggleston v. Boardman*, 37 Mich. 14.

³²⁹ *Eggleston v. Boardman*, 37 Mich. 14; *Briggs v. Town of Georgia*, 10 Vt. 68; *King v. Pope*, 28 Ala. 601; *Rogers v. McKenzie*, 81 N. C. 164.

stitute, and if the client stands by and does not object and afterwards do so.³³⁰ But mere inconvenience is insufficient, the attorney must be unable or incompetent for some good reason.³³¹ And where the facts of a particular case are such that it may reasonably be inferred that the client intended the attorney to have the power to delegate his authority to another, the general rule will yield.³³² Thus, if it is indispensable by law, in order to accomplish the purpose, or it is the ordinary course of trade, or it is understood by the parties to be the mode by which the particular business would or might be done, the authority to appoint an attorney may be implied.³³³

Mechanical or ministerial acts.—It is generally recognized, however, that an attorney may employ mere subordinates to perform mechanical or ministerial work, and the attorney will be bound by the acts of such.³³⁴ There are many kinds of labors to be performed during the course of an attorney's employment, that are merely mechanical and do not require the exercise of any judgment or discretion, nor require any personal knowledge or skill. Such acts as these may be reasonably presumed the client intended he may have performed by a clerk or subordinate.

Assistant counsel.—So the attorney may employ what is called assistant counsel he may choose, but the client will not be bound for the assistant's fees;³³⁵ though the original attorney may charge for the entire labor.³³⁶ But where an attorney is employed to conduct a case pending in another county,

Tenno v. English, 22 Ark. 170; *Smith v. Lipscomb*, 13 Tex. 532; *People v. Plymouth Plank Road Co.*, 32 Mich. 248.

Smith v. Lipscomb, 13 Tex. 532; *People v. Plymouth Plank Road Co.*, 32 Mich. 248.

Villard v. Town of Danville, 45 Vt. 93; *Paddock v. Colby*, 48 Vt. 485.

Johnson v. Cunningham, 1 Ala. 249.

McEwen v. Mazyck, 3 Rich. Law (S. C.) 210; *Eggleston v. Man*, 37 Mich. 14; *Harry v. Hilton*, 11 Abb. N. C. (N. Y.) 100; *Leusler v. City of Virginia*, 3 Nev. 58; *Miller v. Palmer*, 25 N. Y. 357, 81 Am. St. Rep. 107.

Boorhies v. Harrison, 22 La. Ann. 85; *Vilas v. Bundy*, 106 Wis. 168.

See *Price v. Hay*, 132 Ill. 543. Post, § 714.

Vilas v. Bundy, 106 Wis. 168.

he may properly employ local counsel to attend to the formal matters, and charge the fees paid such counsel as expenses, if they are not more than the expenses would have been, had the attorney gone in person.³³⁷ So if the client has full knowledge of such employment of assistant counsel and understands that he is to be charged with the fees of the assistant attorney and makes no objection thereto at the time, he will not be permitted to do so after the case is ended and the services have all been rendered.³³⁸

IV. ATTORNEY'S DUTIES AND LIABILITIES TO HIS CLIENT.

§ 652. In general.

It is the duty of an attorney to conduct his client's affairs with the highest honor and integrity, and with the utmost good faith, and to exercise in all his dealings for the client such a degree of knowledge and skill as is usually exercised by others in the same profession. As shall be seen hereafter, he is not bound to exercise the highest degree of knowledge, skill, and diligence, nor need he guaranty that his efforts in the client's behalf will be successful. If he brings to bear a reasonable degree of diligence, care, and skill, and acts in good faith, he will not be liable if the business does not turn out as successfully as it might have. The relation existing between the attorney and his client is one of especial trust and confidence. His client having reposed trust and confidence in him, and perhaps entrusted to him information or secrets that he would disclose to no other, it is his duty to act in such affairs honorably, zealously, and with the utmost good faith. If he does so he will not be liable to the client for any injury the latter may have suffered; otherwise if he does not, and he is amenable to the summary jurisdiction of the court for any dereliction of duty, not for the purpose of punishment, but for the protection of the court, the proper administration of justice, the dignity and purity of the profession, the public good, and the protection of clients.³³⁹ So

³³⁷ *Dillon v. Watson*, 3 Neb. Unoff. 530.

³³⁸ *Aldrich v. Brown*, 103 Mass. 527; *Young v. Crawford*, 23 Mo. App. 431; *Price v. Hay*, 132 Ill. 543.

³³⁹ *In re Evans*, 22 Utah, 366, 83 Am. St. Rep. 794; *Ex parte Wall*, 107 U. S. 273; *State v. Finn*, 32 Or. 519, 67 Am. St. Rep. 550.

the duty of the attorney to remain loyal to his client's interests throughout the continuance of the transaction for which he was employed. It is his duty to keep himself out of positions that may conflict with his client's interests by reason of his own interest in the matter or by obliging himself to another whose interests are adverse to his client's.

Duty to disclose adverse interests.

It is an attorney's duty, when retained by a client, to disclose to the latter any retainer, obligation or other matter which might be adverse to his client's interests or render him unable to perform his services to his client with a full degree of loyalty and earnestness, or which might have prevented the client from employing him had he known of such adverse interests or retainers; and if he fails to do so and the client is otherwise informed of such adverse interest, it is a breach upon the client, for which the attorney may be held liable.⁴⁰ "When a client employs an attorney, he has a right to presume, if the latter be silent on the point, that he has no engagements which interfere, in any way, with his exclusive devotion to the cause confided to him; that he has no interest which may betray his judgment, or endanger his loyalty."⁴¹ Where, however, the relation has ceased, the former retainer does not prevent the attorney from entering into the employ of the opposite party in the former transaction. If such employment does not tend to directly injure or deceive the former client. Thus, where an attorney who has been retained by one party afterwards acts for the other party and is recognized in such capacity by his former client.

See *Lydall*, 70 Law J. Q. B. 5, 83 Law T. (N. S.) 484; *Reed v. Reed*, 3 Mason, 405, Fed. Cas. No. 17,733; *Gibbons v. Reed*, 95 Ill. 45; *Harding v. Helmer*, 193 Ill. 109; *McLeod v. Appleton*, 127 Ind. 349; *Haverty v. Haverty*, 35 Kan. 438; *Briggs v. Haverty*, 24 Mich. 136; *Hoopes v. Burnett*, 26 Miss. 428; *Arrington v. Arrington*, 116 N. C. 170; *Wilson v. Jennings*, 3 Ohio St. 528; *Wheeler v. Douglass*, 32 Tex. 215. See also *Story*, J., in *Williams v. Reed*, 3 Mason, 405, 418, Fed. Cas. No. 17,733.

client, his conduct is not necessarily fraudulent, if such client is not thereby surprised and prejudiced.³⁴²

§ 654. Duty as to purchasing adverse interests.

(a) **In general.**—It has been seen that it is the duty of an attorney, as well as of any other agent, to at all times act with entire good faith in his dealings for his principal. From this it follows that it is an attorney's duty to always act in his dealings so as to advance his client's interests, and not so as to advance his own interests to the detriment of his client. As a general rule, therefore, an attorney at law cannot, without his client's consent, purchase and hold any adverse right or interest concerning the subject-matter of his employment, or do anything that will cause him to occupy a position adverse to the interests of his client; and if he does so he will be held to hold the interest so acquired as a trustee for the benefit of his client, if the client so elects, unless it is clearly shown that no advantage was taken by the attorney of his position, and that the client was not prejudiced by such purchase;³⁴³ or that the transaction involves no duty or obligation to his client, and the purchase is made in good faith in the usual course of trade.³⁴⁴ An attorney who purchases judgments or claims against his client at a discount cannot reap an advantage therefrom. Such purchase operates for the benefit of the client, and the attorney is entitled only to the amount he paid for the judgments or claims.³⁴⁵ Nor

³⁴² *Humphrey v. Darlington*, 15 Iowa, 207. And see *Culver v. Nester*, 116 Mich. 191.

³⁴³ *Baker v. Humphrey*, 101 U. S. 494; *Gilbert v. Murphey*, 103 Fed. 520; *Valentine v. Stewart*, 15 Cal. 387; *Casserleigh v. Green*, 12 Colo. App. 515; *Sutherland v. Reeve*, 41 Ill. App. 295; *McDowell v. Milroy*, 69 Ill. 498; *Herr v. Payson*, 157 Ill. 244; *Cassem v. Heustis*, 201 Ill. 208, 94 Am. St. Rep. 160; *Hughes v. Willson*, 12 Ind. 491; *Downard v. Hadley*, 116 Ind. 131; *Phillips v. Blair*, 3 Iowa, 649; *Briggs v. Hodgdon*, 78 Me. 514; *Humphrey v. Hurd*, 3 Mich. 436; *Taylor v. Young*, 56 Mich. 285; *Rogers v. Gaston*, 43 Minn. 189; *Cameron v. Lewis*, 56 Miss. 601; *Eoff v. Irvine*, 108 Mo. 378, 3 Am. St. Rep. 609; *Smith v. Brotherline*, 62 Pa. 461; *Henry v. Ralman*, 25 Pa. 354, 64 Am. Dec. 703; *Davis v. Smith*, 43 Vt. 269; *Wheeler v. Willard*, 44 Vt. 640.

³⁴⁴ *McKenna v. Van Blarcom*, 109 Wis. 271.

³⁴⁵ *Olson v. Lamb*, 56 Neb. 104, 71 Am. St. Rep. 670; *Larey v.*

buy in his own name or interest, property in which his is seeking to obtain an interest.³⁴⁶ The right to en- this trust adheres to the property, in favor of the client, it comes into the hands of a bona fide purchaser with- notice. Where the record shows that the attorney had ased property sold under a judgment, for a price less ts amount, it is constructive notice to a purchaser from rney of the implied trust in favor of the client, and pon such purchase the same trust.³⁴⁷

Outstanding claims or titles. The above general rule s with special force where the attorney is employed to et litigation concerning the subject-matter, and the ase is made during the course of litigation, as a con- rule would place the attorney under temptation to be hful to his trust.³⁴⁸ Thus in a land case, an attorney e buy an outstanding title against his client's inter- p. So an attorney who has been consulted about a title d will not be permitted to purchase an outstanding nd then set it up in opposition to his client;³⁵⁰ and oes purchase such outstanding title he holds it in trust s client, if the latter sees fit to claim the benefit of the ase;³⁵¹ nor does it make any difference that the attor- as withdrawn from his client's employment before he the purchase.³⁵² So an attorney employed to sustain rchase the title to land cannot purchase for himself utstanding or opposing title, either before or after the is ended, or during the continuance or after termi-

86 Ga. 468; *Sutherland v. Reeve*, 151 Ill. 384; *Cassem v.* s, 201 Ill. 208, 94 Am. St. Rep. 160.

Maker v. Humphrey, 101 U. S. 494.

Arrett v. Bamber, 9 Phila. (Pa.) 202.

mpson v. Lamb, 7 El. & Bl. 84; *Wright v. Walker*, 30 Ark.

more v. Johnson, 143 Ill. 513, 36 Am. St. Rep. 401; *West v.*

nd, 21 Ind. 305; *Cunningham v. Jones*, 37 Kan. 477, 1 Am.

p. 257; *Wade v. Pettibone*, 11 Ohio, 59, 37 Am. Dec. 408;

v. Ralman, 25 Pa. 354, 64 Am. Dec. 705.

nith v. Brotherline, 62 Pa. 469.

off v. Irvine, 108 Mo. 378, 32 Am. St. Rep. 609.

off v. Irvine, 108 Mo. 378, 32 Am. St. Rep. 609; *Davis v.* 96 Mo. 406.

off v. Irvine, 108 Mo. 378, 32 Am. St. Rep. 609.

& S.—91.

nation of the relation of attorney and client, whether during the time the client holds for himself or after he has conveyed his interest, and any such purchase will enure to the benefit of his client, or the latter's vendee, and will follow the title into the hands of whomsoever may take the land, and the client or his vendee may recover the same on payment or tender of the amount of purchase-money, with interest.³⁵³ But in order for the client to claim the benefit of any purchase by the attorney, the former's right to do so must be exercised within a reasonable time after notice, and unless he does so the right is held to be waived, especially when the delay would affect the rights of innocent third parties.³⁵⁴

The above rule does not apply, however, where the relation of attorney and client no longer exists, and an attorney who purchases claims outstanding against a former client is entitled to prove against the client's assigned estate the full amount of the claims thus purchased, and not merely the amount he paid for them,³⁵⁵ if in making such purchase he uses no information obtained as counsel, and takes no unfair advantage of his client or its general creditors.³⁵⁶

(b) **At a judicial sale.**—And the same rule applies to purchases made by an attorney at a judicial sale of property in respect to which he had been employed as an attorney. Where he makes such a purchase he will be regarded as having made it as the trustee of his client, or it may be avoided, unless it can be shown to have been made fairly and with the client's consent, the burden being on the attorney to show

³⁵³ *Henry v. Ralman*, 25 Pa. 354, 64 Am. Dec. 703; *Galbraith v. Elder*, 8 Watts (Pa.) 81; *Edwards v. Gottschalk*, 25 Mo. App. 549; *Bliss v. Prichard*, 67 Mo. 181; *Johnson v. Outlaw*, 56 Miss. 541; *Case v. Carroll*, 35 N. Y. 385.

³⁵⁴ *Marsh v. Whitmore*, 21 Wall. (U. S.) 178 (holding 12 years too long); *Elmore v. Johnson*, 143 Ill. 513, 36 Am. St. Rep. 401 (7 years); *Herr v. Payson*, 157 Ill. 244 (15 years); *Eckrote v. Myers*, 41 Iowa, 324; *Wills v. Wood*, 28 Kan. 400; *Johnson v. Outlaw*, 56 Miss. 541; *Bliss v. Prichard*, 67 Mo. 181; *Ward v. Brown*, 87 Mo. 468; *Wilber v. Robinson*, 29 Mo. App. 157; *Lewis v. Brown*, 36 W. Va. 1.

³⁵⁵ *Smith v. Craft*, 22 Ky. L. R. 643, 58 S. W. 500.

³⁵⁶ *Smith v. Craft*, 22 Ky. L. R. 643, 58 S. W. 500.

arce v. Gamble, 72 Ala. 341; Briggs v. Hodgdon, 78 Me. 514.
 Isenring v. Black, 5 Watts (Pa.) 303, 30 Am. Dec. 322.
 err v. Payson, 157 Ill. 244; Eckrote v. Myers, 41 Iowa, 324;
 v. Outlaw, 56 Miss. 541; Ward v. Brown, 87 Mo. 468;

case.³⁶⁰ If the client with knowledge afterwards deals with the attorney as the owner of the property, he thereby ratifies the purchase and is estopped from claiming the benefit thereof.³⁶¹ But if an attorney, who has purchased property at a judicial sale in which his client is interested, conceals from such client material facts which might affect the latter's election to treat the attorney as a trustee, dealings between them on the basis of the attorney's ownership, the client being in ignorance of the facts, does not prevent him, upon learning such facts, from enforcing the trust.³⁶²

The above election is a right that belongs only to the client and is a question between the attorney and his client; and a third person cannot set up this right as between himself and the attorney.³⁶³ Or this presumption may be overcome by proof that the relation of attorney and client, although once existing, was at an end when the transaction took place, or was of such a nature as to preclude the presumption of undue influence or imposition,³⁶⁴ or by proving that the property was assigned in payment of reasonable fees for services rendered.³⁶⁵

§ 655. Duty and liability as to skill and diligence—General rule.

It is a universal rule of law that where an attorney undertakes the conduct of a case or the transaction of some legal business for another, he is bound to possess and exercise a reasonable degree of skill, prudence, and diligence about such undertaking, and for a failure to do so he is liable to his client for the damages caused by his negligence.³⁶⁶

Bliss v. Prichard, 67 Mo. 181; *Wade v. Pettibone*, 11 Ohio, 57, 3 Am. Dec. 408 (25 months too long).

³⁶⁰ *Olson v. Lamb*, 56 Neb. 104, 71 Am. St. Rep. 670.

³⁶² *Olson v. Lamb*, 56 Neb. 104, 71 Am. St. Rep. 670.

³⁶³ *Leach v. Fowler's Devisees*, 22 Ark. 143; *Estes v. Boothe*, 2 Ark. 583; *Alwood v. Mansfield*, 59 Ill. 496; *Cowan v. Barret*, 1 Mo. 257; *Holland Trust Co. v. Hogan*, 63 Hun (N. Y.) 631.

³⁶⁴ See ante, § 653. See, also, *Learned v. Haley*, 34 Cal. 608.

³⁶⁵ *Wharton v. Hammond*, 20 Fla. 934; *Newberg v. Schwab*, 4 N. Y. Super. Ct. 232.

³⁶⁶ *England*: *Pitt v. Yalden*, 4 Burrow, 2060; *Godefroy v. Dalton*, 6 Bing. 460; *In re Spencer*, 21 Law T. (N. S.) 808, 39 Law J. Ch.

attorney is not liable for every mistake or error that is made in the course of his practice. If he possesses capacity and learning ordinarily possessed by an attorney

lton v. New Beeston Cycle Co., 69 Law J. Ch. 20, 81 Law (S.) 437.

l States: Suydam v. Vance, 2 McLean, 99, Fed. Cas. No.

ma: Evans v. Watrous, 2 Port. 205; *Mardis' Adm'rs v. Ford*, 4 Ala. 493; *Goodman v. Walker*, 30 Ala. 482, 68 Am.

as: Pennington's Ex'rs v. Yell, 11 Ark. 212, 52 Am. Dec. *rier v. Holliday*, 2 Ark. 512; *Palmer v. Ashley*, 3 Ark. 75.

rnia: Gambert v. Hart, 44 Cal. 542; *In re Kruger's Estate*, 621.

ta: O'Barr v. Alexander, 37 Ga. 195; *Nisbet v. Lawson*, 1 *Cox v. Sullivan*, 7 Ga. 144, 50 Am. Dec. 386.

s: Stevens v. Walker, 55 Ill. 151; *Chase v. Heaney*, 70 Ill. *rrison v. Burnett*, 56 Ill. App. 129.

ta: Citizens' Loan Fund & Sav. Ass'n v. Friedley, 123 Ind. *Am. St. Rep.* 320; *Reilly v. Cavanaugh*, 29 Ind. 435; *Kepler p.*, 11 Ind. App. 241; *Jones v. White*, 90 Ind. 255.

cky: Humboldt Bldg. Ass'n v. Ducker's Ex'r, 111 Ky. 759. *ana: Thompson v. Lobdell*, 7 Rob. 369.

: Wilson v. Russ, 20 Me. 421.

chusetts: Caverly v. McOwen, 123 Mass. 574; *Gilbert v. s*, 8 Mass. 51, 5 Am. Dec. 77 (where he disobeys the lawful ons of his client); *Drury v. Butler*, 171 Mass. 171.

van: Eggleston v. Boardman, 37 Mich. 14; *Babbitt v. Bump- Mich.* 331, 16 Am. St. Rep. 585.

issippi: Fitch v. Scott, 3 How. 314, 34 Am. Dec. 86.

ork: Von Wallhoffen v. Newcombe, 10 Hun, 240; *Hatch v. 33 N. Y. Super. Ct.* 166; *Bowman v. Tallman*, 27 How. Pr.

Grindle v. Rush, 7 Ohio (2d pt.) 123.

ylvania: Riddle v. Poorman, 3 Pen. & W. 224; *Cox v. Liv- 2 Watts & S.* 103, 37 Am. Dec. 486; *Watson v. Muirhead*, 61, 98 Am. Dec. 213.

Island: Holmes v. Peck, 1 R. I. 242; *Forrow v. Arnold*, 305.

see: Gaar v. Hughes (Tenn. Ch. App.) 35 S. W. 1092.

Morrill v. Graham, 27 Tex. 646; *Fox v. Jones* (Tex. App.) 1007.

nt: Spaulding v. Swift, 18 Vt. 214.

ngton: Isham v. Parker, 3 Wash. 755.

nsin: Malone v. Gerth, 100 Wis. 166.

at law, and is properly fitted for such duties as usually fall upon one in his profession, and acts with a reasonable degree of care and diligence, and uses his best judgment, in good faith, for his client's interests, he will not be responsible for any loss or damage that may ensue.³⁶⁷ "An attorney is not an insurer of the result in a case in which he is employed, unless he makes a special contract to that effect and for that purpose. Neither is there any implied contract, when he is employed in a case, or any matter of legal business, that he will bring to bear learning, skill, or ability beyond that of the average of his profession."³⁶⁸ And if the client, who is himself a lawyer, acquiesces after a personal examination of the authorities and from his individual knowledge and superior skill, he is estopped to plead the negligence of his attorney.³⁶⁹

As has been said: "Nor can more than ordinary care and diligence be required of him, without a special contract in writing made requiring it. Any other rule would subject his rights to be controlled by the vagaries and imaginations of witnesses and jurors, and not infrequently to the errors committed by courts. This the law never has done; and the fact that the best lawyers in the country find themselves mistaken as to what the law is, and are constantly differing a

³⁶⁷ *Lanphier v. Phipos*, 8 Car. & P. 475, 34 E. C. L. 844; *Pitt v. Yalden*, 4 Burrow, 2060; *Hinckley v. Krug* (Cal.) 34 Pac. 118; *Pierce v. Gittens*, 72 Conn. 160; *Cox v. Sullivan*, 7 Ga. 148, 50 Am. Dec. 386; *Stevens v. Walker*, 55 Ill. 151; *Walker v. Stevens*, 79 Ill. 193; *Citizens' Loan Fund Sav. Ass'n v. Friedley*, 123 Ind. 143, 18 Am. St. Rep. 320; *Humboldt Bldg. Ass'n v. Ducker's Ex'r*, 111 Ky. 759; *Wrightson v. Russ*, 20 Me. 421; *Babbitt v. Bumpus*, 73 Mich. 331, 16 Am. St. Rep. 585; *Fitch v. Scott*, 3 How. (Miss.) 314, 34 Am. Dec. 86; *Averett v. Jacob*, 59 N. Y. Super. Ct. 585, 15 N. Y. Supp. 564; *Harriman v. Baird*, 158 N. Y. 691; *Gallagher v. Thompson*, *Wright* (Ohio) 466; *Lynch v. Com.*, 16 Serg. & R. (Pa.) 368, 16 Am. Dec. 582; *Morgan v. Giddings* (Tex.) 1 S. W. 369; *Tuley v. Barton*, 79 Va. 387; *Malone v. Gerth*, 100 Wis. 166.

³⁶⁸ *Babbitt v. Bumpus*, 73 Mich. 331, 16 Am. St. Rep. 585; *Bowman v. Tallman*, 27 How. Pr. (N. Y.) 212; *Kepler v. Jessup*, 1 Ind. App. 241; *Citizens' Loan Fund & Sav. Ass'n v. Friedley*, 123 Ind. 143, 18 Am. St. Rep. 320; *Spangler v. Sellers*, 5 Fed. 882.

³⁶⁹ *Carr's Ex'r v. Glover*, 70 Mo. App. 242.

the application of the law to a given state of facts, and the ablest jurists find themselves frequently differing both, shows both the fallacy and danger of any other doctrine; and especially in this so as to questions of practice, construction of statutes, and particularly those arising under our criminal and probate laws. Frequently we find decisions of courts of last resort in the different states directly opposed to each other upon the same questions, and acting upon the same state of facts. These all admonish judges and jurors that great care and consideration should be given to questions involving the proper service to be rendered to attorneys when they have acted in good faith, and with a fair degree of intelligence, in the discharge of their duties as employed under the usual implied contract. Under such circumstances, the errors which may be made by them are not to be very gross before the attorney can be held responsible.

They should be such as to render wholly improbable a disagreement among good lawyers as to the character of the services required to be performed, and as to the manner of their performance under all the circumstances in the given case before such responsibility attaches."³⁷⁰

56. What constitutes negligence by an attorney.

(a) **In general.**—No definite rule can be laid down as to what is a reasonable degree of skill, prudence, and diligence, or failure to exercise which renders the attorney liable as for negligence. The determination of such fact must depend upon the circumstances of each particular case, due regard being had to the character of the business which he is employed to transact.³⁷¹ It may be stated generally, however, that a reasonable degree of skill, prudence, and diligence, with the meaning of this rule, is such skill, prudence, and diligence as is usually possessed and exercised by attorneys of ordinary skill and capacity, in cases similar to the one under consideration, and under similar circumstances.³⁷² Or as has

Babbitt v. Bumpus, 73 Mich. 331, 16 Am. St. Rep. 588.

Cox v. Sullivan, 7 Ga. 144, 50 Am. Dec. 386.

Spangler v. Sellers, 5 Fed. 882; *Gambert v. Hart*, 44 Cal. 542;

State of Kruger, 130 Cal. 621; *Morrison v. Burnett*, 56 Ill. App.

been said, attorneys "are held to the same rule of liability for want of professional skill and diligence in practice, and for erroneous or negligent advice to those who employ them, as are physicians, surgeons, and other persons who hold themselves out to the world as possessing skill and qualification in their respective trades or professions."³⁷³ In some of the cases it has been said that an attorney is liable only for "gross"³⁷⁴ or "ordinary"³⁷⁵ negligence in the performance of his duties; but this is thought to be misleading, as the idea sought to be conveyed is the same, that is, that the attorney is liable for a failure to exercise such care and diligence as is ordinarily exercised by an average attorney, under like circumstances; and it has been the trend of modern decisions to use the word "negligence" alone, without any qualifying adjective.

It is a question of fact for the jury to determine, in any particular case, whether or not the attorney has failed to exercise a reasonable degree of skill, prudence, and diligence, and is guilty of negligence, unless the facts are undisputed, in which case it is a question of law for the court.³⁷⁶

(b) **Mistakes of law and errors of judgment.**—An attorney, however, will not be responsible for mere errors of judgment, or mistakes of law, unless the law is so well known that he

129; Humboldt Bldg. Ass'n v. Ducker's Ex'r, 111 Ky. 759. And see cases cited in note 366, preceding section.

³⁷³ By Mitchell, C. J., in Citizens' Loan Fund & Sav. Ass'n v. Friedley, 123 Ind. 143, 18 Am. St. Rep. 320; Waugh v. Shunk, 20 Pa. 130.

³⁷⁴ Suydam v. Vance, 2 McLean, 99, Fed. Cas. No. 13,657; Evans v. Watrous, 2 Port. (Ala.) 205; Pennington v. Yell, 11 Ark. 212, 52 Am. Dec. 262.

³⁷⁵ Cox v. Sullivan, 7 Ga. 144, 50 Am. Dec. 386; O'Barr v. Alexander, 37 Ga. 195; Kepler v. Jessup, 11 Ind. App. 241.

³⁷⁶ Reece v. Righy, 4 Barn. & Ald. 202; Brazier v. Bryant, 2 Dowl. 600; Hunter v. Caldwell, 10 Q. B. 69; Evans v. Watrous, 2 Port. (Ala.) 205; Walker v. Goodman, 21 Ala. 647; Mardis' Adm'rs v. Shackelford, 4 Ala. 493; Pinkston v. Arrington, 98 Ala. 489; Pennington's Ex'rs v. Yell, 11 Ark. 212, 52 Am. Dec. 262; Gambert v. Hart, 44 Cal. 542; Cox v. Sullivan, 7 Ga. 144, 50 Am. Dec. 386; Kepler v. Jessup, 11 Ind. App. 241; Waldpole v. Carlisle, 32 Ind. 415; Cochrane v. Little, 71 Md. 323; Caverly v. McOwen, 123 Mass. 574; Dearborn v. Dearborn, 15 Mass. 315; Abeel v. Swann, 21 Misc. (N. Y.) 677.

presumed to be familiar with it. As has been stated an attorney who undertakes the management of legal business committed to his charge thereby impliedly represents that he possesses the skill and that he will exhibit the skill ordinarily possessed and employed by well informed members of his profession in the conduct of business such as is ordinarily undertaken. He will be liable if his client's interests are injured on account of his failure to understand and apply the rules and principles of law that are well established and clearly defined in the elementary books, or which have been declared in adjudged cases that have been duly reported and published a sufficient length of time to have become known to those who exercise reasonable diligence in keeping themselves with the literature of the profession.³⁷⁷ It is held to be negligence for an attorney to have want of proper knowledge of all matters of law in common use, or of such plain and obvious principles as every lawyer is presumed to understand.³⁷⁸ An attorney must be presumed to be familiar with the rules and rules regulating the practice in actions which he undertakes to bring.³⁷⁹ Thus if he brings an action within the limits of limited jurisdiction, knowing that the circumstances which gave the right of action arose out of the jurisdiction of such court, he is guilty of negligence.³⁸⁰ A lawyer is without excuse who is ignorant of the ordinary settled rules of pleading and practice, and of the state and published decisions in his own state; but he is not charged with negligence where he accepts as a correct statement of the law a decision of the supreme court of his state" if there has been no decision to the contrary in

Citizens' Loan Fund & Sav. Ass'n v. Friedley, 123 Ind. 143, 18 Ind. Rep. 320; *Hillegass v. Bender*, 78 Ind. 225; *Goodman v. State*, 30 Ala. 482, 68 Am. Dec. 134; *Pennington's Ex'rs v. Yell*, 212, 52 Am. Dec. 262; *Gambert v. Hart*, 44 Cal. 542; *Fitch v. State*, 3 How. (Miss.) 314, 34 Am. Dec. 86; *Fenaille v. Coudert*, 100 N. Y. Law, 286 (but they do not assume to know the laws of other states).

Corrill v. Graham, 27 Tex. 646.

Wallhoffen v. Newcombe, 10 Hun (N. Y.) 240; *Varnum v. State*, 15 Pick. (Mass.) 440.

Williams v. Gibbs, 2 Har. & W. 241, 6 Nev. & M. 788.

the supreme court of the United States.³⁸¹ "Nor can he be held liable for a mistake in reference to a matter in which members of the profession possessed of reasonable skill and knowledge may differ as to the law until it has been settled in the courts; nor if he is mistaken in a point of law in which reasonable doubt may be entertained by well-informed lawyers."³⁸² "The practice of law is not merely an art; it is a science which demands from all who engage in it, without detriment to the public, special qualifications, which can only be attained by careful preliminary study and training, and by constant and unremitting investigation and research. But as the law is not an exact science, there is no attainable degree of skill or excellence at which all differences of opinion or doubts in respect to questions of law are removed from the minds of lawyers and judges. Absolute certainty is not always possible. 'That part of the profession,' said Lord Mansfield,³⁸³ 'which is carried on by attorneys, is liberal and reputable, as well as useful to the public, when they conduct themselves with honor and integrity; and they ought to be protected when they act to the best of their knowledge and skill. But every man is liable to error; and I should be very sorry that it should be taken for granted that an attorney is answerable for every error or mistake, and to be punished for it by being charged with the debt which he was employed to recover for his client.'"³⁸⁴

— **Illustrations.** Thus an attorney is not liable for a mistake in advice given prior to the publication of a decision of the court of last resort in his own state establishing a contrary rule.³⁸⁵ Nor is he answerable for errors of judgment

³⁸¹ *Hastings v. Halleck*, 13 Cal. 203; *Marsh v. Whitmore*, 21 Wa. (U. S.) 178.

³⁸² By *Mitchell, C. J.*, *Citizens' Loan Fund & Sav. Ass'n v. Friedley*, 123 Ind. 143, 18 Am. St. Rep. 322; *Kemp v. Burt*, 4 Barn. Adol. 424; *Hill v. Mynatt* (Tenn. Ch. App.) 59 S. W. 163.

³⁸³ *Pitt v. Yalden*, 4 Burrow, 2060.

³⁸⁴ By *Mitchell, C. J.*, in *Citizens' Loan Fund & Sav. Ass'n v. Friedley*, 123 Ind. 143, 18 Am. St. Rep. 321. See, also, *Watson v. Muhead*, 57 Pa. 161, 98 Am. Dec. 213; *United States Mortg. Co. v. Henderson*, 111 Ind. 24, 34; *Shilcock v. Passman*, 7 Car. & P. 289.

³⁸⁵ *Citizens' Loan Fund & Sav. Ass'n v. Friedley*, 123 Ind. 143, 18 Am. St. Rep. 320.

points of new occurrence, or of nice or doubtful construction;³⁸⁶ nor if it be such an error or mistake as a reasonably prudent attorney would make.³⁸⁷ He is not liable for failure to charge an indorser on a promissory note, left with him for collection before the same was due, without proof of special instructions to do so, or that such was the usual course of business, when both the endorser and maker live at a distance from the place of business;³⁸⁸ nor can he be required to perform the duties of a notary without a special engagement to that effect, unless his course of business authorizes those employing him to expect that he will do so.³⁸⁹ Nor is he liable for an error of judgment in the construction of a difficult or doubtful statute;³⁹⁰ but he is liable for a disregard of a plain statutory provision,³⁹¹ or if he does not take notice of changes made by the public statutes of his state.³⁹²

37. Presumption in favor of attorney.

As a charge of negligence or want of skill is of such a character as, if well founded, will seriously affect the professional character of the attorney, he is entitled, to the full extent, to the benefit of the universal rule extending to the relations of society, that every one shall be presumed to

* *Godefroy v. Dalton*, 6 Bing. 460; *Kemp v. Burt*, 4 Barn. & C. 424; *Pitt v. Yalden*, 4 Burrow, 2060; *Morrill v. Graham*, 27 N. H. 646; *Caverly v. McOwen*, 123 Mass. 574.

* *Montrilou v. Jefferys*, 2 Car. & P. 113; *Lewis v. Collard*, 23 Law Rep. 32.

* *Odlin v. Stetson*, 17 Me. 244, 35 Am. Dec. 248.

* *Odlin v. Stetson*, 17 Me. 244, 35 Am. Dec. 248.

* *Crosbie v. Murphy*, 8 Ir. C. L. 301; *Elkington v. Holland*, 9 Q. B. 659; *Caverly v. McOwen*, 123 Mass. 574; *Bulmer v. Gilman*, 4 Man. & G. 108; *Humboldt Bldg. Ass'n v. Ducker's Ex'r*, 111 N. D. 759.

* *Caverly v. McOwen*, 123 Mass. 574.

* *Estate of A. B.*, 1 Tuck. (N. Y.) 247. As said by the court: "It is not claimed that a person who undertakes to perform professional business should be acquainted with the whole circle of jurisprudence, and able to apply all its multitudinous rules, principles and distinctions with absolute accuracy. He is, however, bound to understand the leading and fundamental principles of the common law; and he cannot be excused for ignorance of the public statutes of the state."

have discharged his legal and moral obligations until the contrary shall be made to appear—"omnia praesumuntur rite et solemniter esse acta, donec probetur in contrarium."³⁹³

§ 658. Negligence in examining titles.

If an attorney engages in the business of searching the public records, examining titles to real estate, and making abstracts thereof, for compensation, the law will imply that he assumes to possess the requisite knowledge and skill, and that he undertakes to use due and ordinary care and diligence in the performance of his duty; and for a failure in either of these respects, resulting in damages, the party injured is entitled to recover.³⁹⁴ The attorney does not impliedly contract that the title shall be good or the abstract perfect, but he does warrant that there are no incumbrances, or if any that he has enumerated them, and that he has obtained all material facts that might be discovered with reasonable diligence and care.³⁹⁵ Thus, if the attorney for a mortgagor who pays the fees, undertakes, on behalf of the mortgagee, to see that the mortgage is a first lien on the property, he is bound to perform that duty with ordinary and reasonable skill and care;³⁹⁶ if he is guilty of negligence in this respect, the mortgagee, without waiting for the mortgage to be foreclosed, may at once recover from such attorney the difference between the value of the security contracted for and that actually received. The cause of action is the breach of duty,

³⁹³ *Pennington's Ex'rs v. Yell*, 11 Ark. 212, 52 Am. Dec. 262; *Bank of U. S. v. Dandridge*, 12 Wheat. (U. S.) 69, 70; *Fridge v. State*, 3 Gill & J. (Md.) 103, 20 Am. Dec. 463; *Whittlessey v. Starr*, 8 Conn. 134; *Truwitt v. Depree*, 2 Car. & P. 557; *Holmes v. Peek*, 1 R. I. 242.

³⁹⁴ *Howell v. Young*, 5 Barn. & C. 259, 11 E. C. L. 454; *Ireson v. Pearman*, 5 Dowl. & R. 687, 3 Barn. & C. 799; *Allen v. Clark*, 1 New Rep. 358; *National Sav. Bank of D. C. v. Ward*, 100 U. S. 195; *Hinckley v. Krug* (Cal.) 34 Pac. 118; *Chase v. Heaney*, 70 Ill. 268; *Thomas v. Schee*, 80 Iowa, 237; *Clark v. Marshall*, 34 Mo. 429; *Rankin v. Schaeffer*, 4 Mo. App. 108; *Byrnes v. Palmer*, 18 App. Div. (N. Y.) 1; *Currey v. Butcher*, 37 Or. 380. Compare *Watson v. Calvert Bldg. & Loan Ass'n*, 91 Md. 25.

³⁹⁵ *Rankin v. Schaeffer*, 4 Mo. App. 108.

³⁹⁶ *Lawall v. Groman*, 180 Pa. 532, 57 Am. St. Rep. 662.

the damages, which are only an incident.³⁹⁷ So also he is guilty of negligence for overlooking a judgment which is upon the land.³⁹⁸ But where there is some doubt as to whether an incumbrance is valid, and he seeks the advice of competent counsel, who give him a written opinion, which follows, he is not guilty of negligence therein.³⁹⁹

Negligence in collecting.

When a claim is put into an attorney's hands for collection it is his duty to use all reasonable and proper means to collect the same, and to exercise a reasonable degree of prudence, and diligence in so doing. For a failure to do so he will be liable to his client for any loss occasioned by his negligence.⁴⁰⁰ Where he has such an undertaking it is his duty to sue out all process, both mesne and final, necessary to effect that object; and consequently he must not only commence the first process of execution, but he must also take such other steps as may become necessary during the progress of the cause.⁴⁰¹ He may even be justified in ceasing to proceed with the client's cause, whenever he is bona fide influenced by a prudent regard for the interest of his

Swallow v. Groman, 180 Pa. 532, 57 Am. St. Rep. 662.

Hillman v. Hovey, 26 Mo. 280.

Watson v. Muirhead, 57 Pa. 161, 98 Am. Dec. 213. And see *Goldt Bldg. Ass'n v. Ducker's Ex'r*, 111 Ky. 759.

Woodman v. Walker, 30 Ala. 482, 68 Am. Dec. 134; *Cox v. Sullivan*, 7 Ga. 144, 50 Am. Dec. 386; *Stevens v. Walker*, 55 Ill. 151;

Reilly v. Falls, 91 Ind. 315; *Reilly v. Cavanaugh*, 29 Ind. 435;

Man v. Wood, 117 Ind. 144; *Eccles v. Stephenson*, 3 Bibb (Ky.)

King v. Fourchy, 47 La. Ann. 354; *Smallwood v. Norton*, 20

Am. St. Rep. 37, 37 Am. Dec. 39; *Wilson v. Coffin*, 2 Cush. (Mass.) 316; *Gil-*

Williams, 8 Mass. 51, 5 Am. Dec. 77; *Dearborn v. Dearborn*,

Mass. 316; *Fitch v. Scott*, 3 How. (Miss.) 314, 34 Am. Dec. 86;

Livingston, 2 Watts & S. (Pa.) 103, 37 Am. Dec. 486; *Wal-*

ver, 161 Pa. 605; *Riddle v. Poorman*, 3 Pen. & W. (Pa.) 224;

W. Martin, Riley (S. C.) 156; *Gaar v. Hughes* (Tenn. Ch. App.)

W. 1092; *Oldham v. Sparks*, 28 Tex. 425; *Rootes v. Stone*,

Ch. (Va.) 650.

Pennington's Ex'rs v. Yell, 11 Ark. 212, 52 Am. Dec. 262;

W. Hutchinson, 2 D. Chip. (Vt.) 117; *Wright v. Ligon*, Harp.

(S. C.) 137; *Dearborn v. Dearborn*, 15 Mass. 316.

client.⁴⁰² If he honestly believes it is for the best interests of his client, and has used reasonable skill, prudence, and diligence in the case, he may, for a reasonable time, fail to sue or defend at all, in the absence of express instructions to the contrary.⁴⁰³ But he is liable for his neglect to bring a suit upon a note or claim deposited with him for collection with express instructions to bring suit, although he may have honestly believed, in the exercise of his best judgment, that a suit would be unavailing or that the client's interest would be promoted by such delay.⁴⁰⁴ In any event, if he delays an unreasonable length of time in bringing the action, he will be liable for any loss or damage that results therefrom, and what is an unreasonable length of time depends upon the facts and circumstances of each particular case. Thus it was held to be unreasonable for him to delay seventeen months in the commencement of proceedings;⁴⁰⁵ or to wait until the claim had been barred by the statute of limitations.⁴⁰⁶ Nor where he undertakes to collect a debt must he be so negligent as to put it into such a situation as to embarrass the creditor in obtaining payment, and to render it of less value, although the debtor always has been and is still able to pay the note.⁴⁰⁷

But although it is his duty thus to pursue his client's cause through all its stages, he is not imperiously bound to institute new collateral suits without special instructions to do so,—and actions against the sheriff or clerk for the failure of their duty in the issuance or service of process, nor is he bound to attend in person to the levy of an execution, or to search

⁴⁰² *Pennington's Ex'rs v. Yell*, 11 Ark. 212, 52 Am. Dec. 262; *Crooker v. Hutchinson*, 2 D. Chlp. (Vt.) 117.

⁴⁰³ *Rhines' Adm'rs v. Evans*, 66 Pa. 192, 5 Am. Rep. 364; *Morgan v. Giddings* (Tex.) 1 S. W. 369; *Morrill v. Graham*, 27 Tex. 646; *Bennett v. Phillips*, 57 Iowa, 174.

⁴⁰⁴ *Cox v. Livingston*, 2 Watts & S. (Pa.) 103, 37 Am. Dec. 486; *Gilbert v. Williams*, 8 Mass. 51, 5 Am. Dec. 77; *Livingston v. Cox*, 6 Pa. 360; *Fitch v. Scott*, 3 How. (Miss.) 314, 34 Am. Dec. 86; *Stevens v. Walker*, 55 Ill. 151.

⁴⁰⁵ *Rhines' Adm'rs v. Evans*, 66 Pa. 192, 5 Am. Rep. 364.

⁴⁰⁶ *Oldham v. Sparks*, 28 Tex. 425; *Hunter v. Caldwell*, 10 Q. B. 69.

⁴⁰⁷ *Wilson v. Coffin*, 2 Cush. (Mass.) 316.

property, out of which to make the debt; this is the duty of the sheriff.⁴⁰⁸ So it is not the duty of an attorney to make the affidavit or execute the bond in attachment, when instructed to attach.⁴⁰⁹ Although an attorney is liable for the loss of a debt by his negligence, it is held he is not of course liable for the loss of the evidence of the debt.⁴¹⁰

2. Negligence in preparing contracts.

When an attorney undertakes to prepare a contract, deed, or other paper, he impliedly contracts that he possesses the requisite knowledge and skill to perform the particular duty which he is employed, and that he will exercise a reasonable amount of care, diligence, and prudence in so doing. He is not to make the contract for the parties; they do that themselves.

He merely undertakes to embody in a written instrument the terms the parties have agreed upon, so that it will have the legal effect they desire. And if he is negligent or unequal in the undertaking, by reason of which loss or damage results to his client, he is liable therefor.⁴¹¹ Thus he is liable where he makes a simple contract when it should have been under seal,⁴¹² or where he inserts unusual covenants in an instrument,⁴¹³ or where he omits to use some requisite formality in it.⁴¹⁴ But if the attorney has used ordinary care, and diligence on his part, he is not liable if damage results, or the instrument proves unavailing by reason of some fact which is no part of his duty. Thus, where he executes an agreement, upon which there was some doubt as to its legality, and he consults a conveyancer, who gives it as his opinion that the instrument was valid, he has used ordinary care and knowledge and is not liable if the instrument

Pennington's Ex'rs v. Yell, 11 Ark. 212, 52 Am. Dec. 268.

Houlks v. Falls, 91 Ind. 315.

Wentington v. Rumrill, 3 Day (Conn.) 390.

Warker v. Rolls, 14 C. B. 691, 78 E. C. L. 691; *Taylor v. Gorton*, 1 Ir. Eq. 550; *Stott v. Harrison*, 73 Ind. 17.

Warker v. Rolls, 14 C. B. 691, 78 E. C. L. 691.

Stannard v. Ullithorne, 10 Bing. 491, 25 E. C. L. 235.

Stott v. Harrison, 73 Ind. 17.

afterwards proves to be illegal.⁴¹⁵ And where an attorney is employed to draw up a deed of assignment for the benefit of creditors, he is not bound to ascertain whether the creditors would sign, and is not guilty of negligence if the assignment prove unavailing by reason of the creditors not all signing.⁴¹⁶ So where he is merely asked to draw up a contract and for certain advice, he is not, in the absence of anything wrong with the papers drawn or the advice, liable to his client for failure of the other party to make payments as agreed.⁴¹⁷

— **Recording contract or deed.** It is ordinarily no part of the duty of an attorney employed to prepare a contract, deed, etc., to record it, although it is required to be registered in order to be effective as to third persons, unless he has specially undertaken to do so; and in the absence of such an undertaking, he will not be liable for failing to record the instrument.⁴¹⁸ Thus an attorney employed to draw a building contract is not bound to have it recorded so as to prevent lien from attaching;⁴¹⁹ nor is an attorney, employed to revive judgment, bound to see that the judicial mortgage fixing the lien on the land is reinscribed.⁴²⁰ But when he has expressly or impliedly contracted to attend to the recordation of such contracts, etc., he will be liable for a failure or negligence in so doing.⁴²¹ Thus, where an attorney, who is a notary, undertakes and agrees, for a consideration, to draw a chattel mortgage, and to deliver it, without additional compensation to the recorder of the county for record, and cause the same to be recorded, for failure to perform the latter undertaking whereby the lien of said mortgage is lost, he is liable in damages.⁴²² It may be his duty in certain cases to advise his client of the necessity of recordation, and in such cases he would be liable for neglecting to do so.⁴²³

⁴¹⁵ *Potts v. Sparrow*, 6 Car. & P. 749.

⁴¹⁶ *Lewis v. Collard*, 2 C. L. 1345, 14 C. B. 208.

⁴¹⁷ *Harkness v. Caven*, 199 Pa. 267.

⁴¹⁸ *Fenaille v. Coudert*, 44 N. J. Law, 286.

⁴¹⁹ *Fenaille v. Coudert*, 44 N. J. Law, 286.

⁴²⁰ *McKowen v. Kernan*, 35 La. Ann. 331.

⁴²¹ *Stott v. Harrison*, 73 Ind. 17; *Miller v. Wilson*, 24 Pa. 114.
⁴²² *Fenaille v. Coudert*, 44 N. J. Law, 290.

⁴²³ *Stott v. Harrison*, 73 Ind. 17.

⁴²³ *Plant v. Pearman*, 41 Law J. Q. B. 169.

Negligence in instituting and conducting suits.

It is also the duty of an attorney at law to use a reasonable degree of skill, diligence, and care in instituting a suit on behalf of his client. He may make himself liable to his client for negligence in instituting a suit or action in various ways.

He may become liable for not bringing the suit in the proper court or the proper jurisdiction, or for not bringing the proper form of action, or for not following certain rules of practice, etc. If the law governing the bringing of a suit is clearly and well defined, both in the text-books and in the decisions of the courts, and if it had existed and been observed long enough to justify the belief that it was known to the legal profession, a disregard of such rule by an attorney at law renders him liable for the losses caused by such negligence. It may be want of skill,—negligence if, knowing the rule, he disregarded it; want of skill if he was ignorant of it.⁴²⁴ An attorney is liable for the consequences of ignorance or disregard of the rules of practice of the court he practices in, for want of care in the preparation of the cause for trial.⁴²⁵

Thus it is a well settled rule that there must not be a discrepancy between the declaration and the writ as to the names of parties, and the disregard of so plain a rule would render an attorney liable for want of reasonable skill or of reasonable diligence,⁴²⁶ for the attorney would be liable.⁴²⁷ So he may be negligent in not using a reasonable degree of care and diligence in the preparation of all process or papers that may be necessary during the progress of a cause.⁴²⁸ It may not be the strict professional duty of an attorney to prepare or supervise the preparation of certain papers; but if he does

Goodman v. Walker, 30 Ala. 482, 68 Am. Dec. 134; *Varnum v. Spence*, 15 Pick. (Mass.) 440; *Cox v. Leech*, 1 C. B. (N. S.) 617; *Frame*, 6 Clark & F. 193; *McWilliams v. Hopkins*, 4 Rawle 382.

Godfrey v. Dalton, 6 Bing. 460.

Chapman v. Spence, 22 Ala. 588; *Goodman v. Walker*, 30 Ala. 482, 68 Am. Dec. 134.

Goodman v. Walker, 30 Ala. 482, 68 Am. Dec. 134.

Goodman v. Walker, 30 Ala. 482, 68 Am. Dec. 134; *Varnum v. Spence*, 15 Pick. (Mass.) 440.

. & S.—92.

undertake to do so, and does it so negligently or unskillfully, that his client, in the progress of the cause, suffers an injury by reason of such want of care and skill, the attorney is liable therefor.⁴²⁹ Thus in an action against an attorney for negligence in making a writ, it appeared that he used a printed form containing the common money counts, with blank spaces for the insertion of sums; that formerly the word "hundred" was printed in the forms of writs, but was omitted in the recent forms, one of which he made use of, so that by mistake he declared for twelve dollars instead of twelve hundred, the sum due to the plaintiffs being one thousand dollars; that property to the value of twelve hundred dollars was attached on the writ, but in consequence of the mistake the plaintiffs lost the benefit of the attachment and were unable to obtain payment of their demand, the debtor being insolvent; and that at the same time when the attorney made the writ for the plaintiffs he made another with a similar blank form, in which he wrote the word "hundred." It was held that this evidence was sufficient to sustain a verdict against the attorney on the ground of negligence.⁴³⁰ Likewise an attorney is negligent for not charging a prisoner in custody in due time;⁴³¹ or for failing to be prepared for trial.⁴³²

But want of professional skill cannot be predicated of an attorney's proceeding to try a cause on a theory which is contrary to an alleged principle of law; where both the trial justice and the general term of the supreme court deny the alleged principle of law, and sustain the attorney's theory.⁴³³ Nor is he liable for negligence if he enters a plea according to recognized practice, which is radically changed by a decision of the court in the case, and which the attorney could not have reasonably anticipated;⁴³⁴ or if he does not

⁴²⁹ *Goodman v. Walker*, 30 Ala. 482, 68 Am. Dec. 140.

⁴³⁰ *Varnum v. Martin*, 15 Pick. (Mass.) 440.

⁴³¹ *Pitt v. Yalden*, 4 Burrow, 2060; *Russell v. Stewart*, 3 Burrow 1787.

⁴³² *Reece v. Rlghy*, 4 Barn. & Ald. 202; *Mercer v. King*, 1 Fost. F. 490; *Hatch v. Lewis*, 2 Fost. & F. 467, 7 Hurl. & N. 367.

⁴³³ *Avery v. Jacob*, 59 N. Y. Super. Ct. 585, 15 N. Y. Supp. 564.

⁴³⁴ *Patterson v. Powell*, 31 Misc. (N. Y.) 250.

the name of one, in whose name he was under no obligation to sue.⁴³⁵

Conduct of suit. Likewise the attorney must use due care and skill during the trial of a case, in applying the law of practice, or in doing anything that is necessary and proper for the due and orderly conduct of his client's case, and for a failure to do so he will be liable to his client for damages resulting therefrom.⁴³⁶ Thus, it is his duty to conduct the case or trial with a reasonable degree of learning, skill, and prudence, and for failing to do so he would be liable to his client; but he would not be liable for an error of judgment of the court.⁴³⁷ So where an attorney is employed to conduct a suit, and he fails to attend at the time appointed, he becomes responsible for the resulting damages,⁴³⁸ or he is liable for the damages if he permits a trial to proceed without securing the attendance of material witnesses,⁴³⁹ or if he neglects to get briefs filed or take necessary steps in the preparation of the case, by reason of which there is a delay which causes his client loss.⁴⁴⁰ So where he advises his client to refuse to answer certain questions on a matter as to whose propriety and pertinency there was no real dispute, and the client suffers damage thereby, the attorney is liable therefor;⁴⁴¹ or for other improper or unskillful advice.⁴⁴² So the attorney is responsible for damages if he negligently or through bad faith abandons the action,⁴⁴³ or dismisses it

where a father employs counsel to sue for damages for injury to his minor son, there is no legal obligation on the attorney in the absence of express understanding, to sue in the name of the father as well as the son, and there is no liability on him for not doing so, particularly where the father makes no objection to the course pursued. *Youngman v. Miller*, 98 Pa. 196.

Defrey v. Dalton, 6 Bing. 468; *Childs v. Comstock*, 69 App. (N. Y.) 160.

Allaheer v. Thompson, Wright (Ohio) 466; *Bowman v. Tallant*, 10 How. Pr. (N. Y.) 274.

Yannell v. Ellis, 1 Bing. 347.

Dece v. Rigny, 4 Barn. & Ald. 202.

Rouffign v. Peale, 3 Taunt. 484; *Walsh v. Shumway*, 65

Thon v. Albert, 7 Paige (N. Y.) 278.

Schran v. Little, 71 Md. 323; *Looff v. Lawton*, 97 N. Y. 478.

Penney v. Berger, 93 N. Y. 524, 45 Am. Rep. 263.

improperly,⁴⁴⁴ or if he dismisses it and receives claims from other parties,⁴⁴⁵ or if he withdraws the defense.⁴⁴⁶ It is the attorney's duty to carefully conduct his client's cause at every stage of the proceedings,⁴⁴⁷ and he cannot abandon it at any time without just cause, or his client's consent,⁴⁴⁸ without due notice thereof to his client.⁴⁴⁹ But where the attorney has requested the client to pay or secure to him reasonable fees, and the latter has failed to do so, he may refuse to proceed with the cause, after notice of such intention.⁴⁵⁰

§ 661. Negligence after verdict or judgment.

Not only must an attorney take every step necessary in the course of proceedings before judgment or verdict, but even thereafter, as his authority continues for certain purposes, he must take all measures that may be necessary to protect his client's interests, whether to enforce the judgment or to defend against proceedings on it. And if he is unskillful or negligent in the performance of any of these proceedings by reason of which loss or injury results to his client, he will be responsible therefor.⁴⁵² Thus, he should pursue bail, and all those who may become bound with the defendant in the progress of the suit.⁴⁵³ So he is liable where he neglects to charge the defendant by execution, whereby he was discharged;⁴⁵⁴ or where he fails to sue out *scire facias* against

⁴⁴⁴ *Evans v. Watrous*, 2 Port. (Ala.) 205.

⁴⁴⁵ *Coopwood v. Baldwin*, 25 Miss. 129. See, also, *Walpole v. Adm'r v. Carlisle*, 32 Ind. 415.

⁴⁴⁶ *Godefroy v. Jay*, 5 Moore & P. 284.

⁴⁴⁷ *Drais v. Hogan*, 50 Cal. 121.

⁴⁴⁸ *Thompson v. Dickinson*, 159 Mass. 210; *Cairo & St. L. R. Co. v. Koerner*, 3 Ill. App. 248. See post, § 741.

⁴⁴⁹ *Thompson v. Dickinson*, 159 Mass. 210; *Hoby v. Built*, 3 B. & Adol. 350, 23 E. C. L. 158. See post, § 741.

⁴⁵⁰ *Gleason v. Clark*, 9 Cow. (N. Y.) 57; *Castro v. Bennet*, 2 Jobb. (N. Y.) 296; *Cairo & St. L. R. Co. v. Koerner*, 3 Ill. App. 248; *Eccles v. Stephenson*, 3 Bibb (Ky.) 517. See, also, *Cavilland v. Yale*, 3 Cal. 108, 58 Am. Dec. 388. See post, § 741.

⁴⁵¹ Ante, § 650.

⁴⁵² *Pennington's Ex'rs v. Yell*, 11 Ark. 212, 52 Am. Dec. 262.

⁴⁵³ *Pennington's Ex'rs v. Yell*, 11 Ark. 212, 52 Am. Dec. 262.

⁴⁵⁴ *Russell v. Palmer*, 2 Wils. 325.

in a reasonable time.⁴⁵⁵ It is also negligence for to submit a motion for a new trial before the statement port of it is certified;⁴⁵⁶ or, in drawing up a decree the word "enquiry" instead of "sale,"⁴⁵⁷ and reliance promise of a reputable person does not excuse his negligence.⁴⁵⁸ He is liable for his negligence and unskillfulness in altering a verdict and having it accepted by the jury to the detriment of his client.⁴⁵⁹ And if a judgment is obtained against a party upon a complaint which is radically defective, and he desires to appeal, and procures bondsmen, and the attorney neglects to do so until the time for appeal expires, the attorney is liable for the loss sustained thereby;⁴⁶⁰ the attorney is not liable for a delay if he performs the duty within the time allowed by law.⁴⁶¹

He may be held liable for negligence or want of skill in the performance of any act that is his duty or that he undertakes to perform after verdict or judgment; and he cannot escape the consequences of his negligence or want of skill, merely by showing that he consulted a distinguished lawyer as to the course to be pursued, and that in the opinion of the witness an arrangement thereafter made by him was, under the circumstances, the best he could do for his client.⁴⁶² Nor can he show champerty as a defense;⁴⁶³ nor is his liability for negligence affected by want of diligence on the part of the client,⁴⁶⁴ nor by the negligence of one subsequently acting for him. Nor can he relieve himself from liability by the employment or substitution of other counsel.⁴⁶⁵

Dearborn v. Dearborn, 15 Mass. 315; *Crooker v. Hutchinson*, 38 N. H. 38.

Lambert v. Hart, 44 Cal. 542.

Re Bolton, 9 Beav. 272.

Re Bolton, 9 Beav. 272.

Millen v. Wallace, 36 Ind. 319.

Wais v. Hogan, 50 Cal. 121.

Olmes v. Peck, 1 R. I. 242.

Woodman v. Walker, 30 Ala. 482, 68 Am. Dec. 134. But see

W. v. Muirhead, 57 Pa. 161, 98 Am. Dec. 213.

Woodman v. Walker, 30 Ala. 482, 68 Am. Dec. 134.

W. v. Sullivan, 7 Ga. 144, 50 Am. Dec. 386.

Wingston v. Cox, 6 Pa. 360.

W. v. Norton, 20 Me. 83, 37 Am. Dec. 41.

§ 662. Negligence of partners, subattorneys, etc.

It is a general rule that the employment of one member of a firm is the employment of all the members, and that each member is responsible for the acts of the others whilst engaged in partnership business. Hence, where one member of a firm of lawyers is employed by a client, such member is bound to conduct the business with a reasonable degree of skill, care, and diligence, and for not doing so any member of the firm may be held liable, although he had no knowledge of nor in any way participated in the transaction. And this liability continues even after the dissolution of the partnership, notwithstanding such dissolution may have taken place before the business entrusted to them was completed, unless notice of the dissolution has been given.⁴⁶⁹ Thus, if one partner, in the course of firm business, receives and expends funds belonging to the client, all the members of the firm are liable for the loss;⁴⁷⁰ or if the injury to the client results from the negligence or want of skill of one partner, all are liable.⁴⁷¹ And where there are no firm assets applicable to a loss occasioned by one of the members, the separate estate of any one of the members is liable therefor.⁴⁷² Even if money or other property comes into the hands of a member of a firm in the course of some transaction not connected

⁴⁶⁹ *Norton v. Cooper*, 3 Smale & G. 375; *Harman v. Johnson*, 10 El. & Bl. 61; *Dundonald v. Masterman*, L. R. 7 Eq. 504, 38 Law Ch. 350; *Cook v. Bloodgood*, 7 Ala. 683; *Alexander v. State*, 56 Ala. 478; *Smyth v. Harvie*, 31 Ill. 62, 83 Am. Dec. 202; *Fornes v. Wright*, 91 Iowa, 392, 395; *McGill's Creditors v. McGill's Adm'r*, 2 Metc. (Ky.) 258; *Dwight v. Simon*, 4 La. Ann. 490; *Wilkinson v. Griswold*, 12 Smedes & M. (Miss.) 669; *Ganzer v. Schiffbauer*, 40 N. H. 633; *Warner v. Griswold*, 8 Wend. (N. Y.) 665; *Livingston v. Crary*, 6 Pa. 360; *Poole v. Gist*, 4 McCord (S. C.) 259; *Porter v. Vance*, 6 Lea (Tenn.) 629. See, also, *Richardson v. Richardson*, 100 Mich. 364.

⁴⁶⁸ *Smyth v. Harvie*, 31 Ill. 62, 83 Am. Dec. 202; *Poole v. Gist*, 4 McCord (S. C.) 259.

⁴⁶⁹ *Smyth v. Harvie*, 31 Ill. 62, 83 Am. Dec. 202.

⁴⁷⁰ *McFarland v. Crary*, 8 Cow. (N. Y.) 253; *Livingston v. Crary*, 6 Pa. 360.

⁴⁷¹ *Warner v. Griswold*, 8 Wend. (N. Y.) 665; *Livingston v. Crary*, 6 Pa. 360.

⁴⁷² *McGill's Creditors v. McGill's Adm'r*, 2 Metc. (Ky.) 258.

the firm business, and from which the firm receives no fits, the firm is not responsible for his misapplication or misappropriation of the funds or property.⁴⁷³

— **Subattorneys.** So where an attorney without authority employs a subattorney to prosecute a claim placed in his hands for collection, he is liable to his client for the negligence or wrongful acts of such subattorney,⁴⁷⁴ and the fact that such person is a competent lawyer does not relieve the attorney employing him from liability to his client on account of such negligence.⁴⁷⁵ Thus he is liable if he employs another attorney to collect a claim placed in his hands, and the latter collects the same and converts the money to his own use.⁴⁷⁶ Where, however, the second attorney or associate has been employed by the first at the instance or by the authority of the client, the first attorney would not be liable to the client for negligence or want of skill of the associate, if he had used due care in his selection.⁴⁷⁷ Nor would he be liable individually for neglect if he gave the client notice that he had associated another with him as partner, and who had collected the money, if the client recognized the partnership in the transaction of his business.⁴⁷⁸

— **Clerks, etc.** So an attorney is liable to his client for negligence or misconduct of his clerk, or employe, as he would be for his own act.⁴⁷⁹ Thus, where an attorney who collected money for his client delivered it to a third person to carry to his client, without authority or directions from his client to do so, he is liable for the sum thus collected, if the money be stolen from such third person while on his way with

Alexander v. State, 56 Ga. 478; *Linn v. Ross*, 16 N. J. Law, 409; *Dounce v. Parsons*, 45 N. Y. 180; *Ex parte Eyre*, 1 Phil. Ch. 409; *Coomer v. Bromley*, 5 De Gex & S. 532.

Walker v. Stevens, 79 Ill. 193; *Smallwood v. Norton*, 20 Me. 477; 7 Am. Dec. 41.

Walker v. Stevens, 79 Ill. 193.

Pollard v. Rowland, 2 Blackf. (Ind.) 22; *Cummins v. Heald*, 36 Am. Rep. 264. See, also, *Bradstreet v. Everson*, 72 N. H. 24, 13 Am. Rep. 665; *Morgan v. Tener*, 83 Pa. 305.

Ante, § 651.

Mardi's Adm'rs v. Shackleford, 4 Ala. 493.

Floyd v. Nangle, 3 Atk. 568; *Birbeck v. Stafford*, 14 Abb. Pr. (N. Y.) 285; *Power v. Kent*, 1 Cow. (N. Y.) 211.

the money, even though such person was trustworthy, and took the same care of his money that he did of his own;⁴⁸⁰ or where an employe failed to give him notice of a trial, which was thus undefended and lost.⁴⁸¹

Where two or more attorneys are employed at the same time to attend to a certain piece of litigation, the contract does not require that all of them should be present at the same time, where, on consultation, they agree that it is unnecessary.⁴⁸²

§ 663. Negligence of persons not admitted as attorneys.

Although these rules generally apply only to attorneys at law, as such, they will also be held to apply to persons who falsely represent themselves to be attorneys. If one falsely represents himself as an attorney, he will be held to the same degree of responsibility to his client as though he were in fact an attorney.⁴⁸³ But it seems that if a person not legally authorized to practice law is employed to conduct judicial proceedings, he is not legally responsible to his employer for any loss the latter may sustain in consequence of the ignorance of the person so employed in respect to legal proceedings.⁴⁸⁴

§ 664. Measure of damages.

Where an attorney has been negligent or wanting in skill in the performance of acts for his client, and loss has been occasioned to the latter thereby, the measure of damages for which the former is liable to the latter is the actual loss sustained by the latter as a natural and proximate result of such negligence.⁴⁸⁵ Thus, where an attorney negligently failed

⁴⁸⁰ Grayson v. Wilkinson, 5 Smedes & M. (Miss.) 268.

⁴⁸¹ Collins v. Griffin, Barnes, 37.

⁴⁸² Phillips v. Edsall, 127 Ill. 535.

⁴⁸³ Miller v. Whelan, 158 Ill. 544; Foulks v. Falls, 91 Ind. 315.

⁴⁸⁴ Wakeman v. Hazleton, 3 Barb. Ch. (N. Y.) 148.

⁴⁸⁵ Suydam v. Vance, 2 McLean, 99, Fed. Cas. No. 13,657; *Mardis v. Adm'rs v. Shackelford*, 4 Ala. 493; *Pennington's Ex'rs v. Yell*, 1 Ark. 212, 52 Am. Dec. 262; *Nisbet v. Lawson*, 1 Ga. 275; *Cox v. Sullivan*, 7 Ga. 144, 50 Am. Dec. 386; *Langmade v. Glenn*, 57 Ga. 528; *Stevens v. Walker*, 55 Ill. 151; *Goldzier v. Poole*, 82 Ill. App.

on a note given him for collection, the measure of damages is the sum that might have been recovered of the note if a suit had been commenced and prosecuted to judgment.⁴⁸⁶ So in an action for money had and received, the measure of damages is the amount of money collected, with interest thereon from the time of demand, or from the date of reception, if the attorney has failed to give notice to the client, or willfully misapplied or appropriated the money for his own use.⁴⁸⁷ The criterion is not the amount of the loss in the first suit, but the loss actually sustained;⁴⁸⁸ and damages may extend to facts that grew out of the original transaction, even up to the day of verdict.⁴⁸⁹ Consequently if the client has been suffered by the client from the legal effects of the attorney's negligence, there is no liability on the attorney, and the client cannot recover from him.⁴⁹⁰ Nor is the attorney liable for any damages except those that occur as the proximate result of his own negligence, and if the case is taken out of his hands and put into the hands of another attorney, he would not be liable for damages caused by the negligence of the second attorney.⁴⁹¹

burden of showing that injury has resulted to the client.

Coorman v. Wood, 117 Ind. 144; *Jamison v. Weaver*, 81 Iowa, 517; *McCles v. Stephenson*, 3 Bibb (Ky.) 517; *Watson v. Calvert & Loan Ass'n*, 91 Md. 25; *Dearborn v. Dearborn*, 15 Mass. 51; *Grayson v. Williams*, 8 Mass. 51, 5 Am. Dec. 77; *Grayson v. Williams*, 5 Smedes & M. (Miss.) 268; *Arnold v. Robinson*, 3 N. Y. 298; *Quinn v. Van Pelt*, 56 N. Y. 417; *Fay v. McClellan*, 20 App. Div. 569, 162 N. Y. 644; *Cox v. Livingston*, 2 Watts (Pa.) 103, 37 Am. Dec. 486; *Forrow v. Arnold*, 22 R. I. 305; *Forrow v. Hutchinson*, 2 D. Chip. (Vt.) 117; *Bootes v. Stone*, 2 (Va.) 650.

Cox v. Livingston, 2 Watts & S. (Pa.) 103, 37 Am. Dec. 486; *Grayson v. Williams*, 8 Mass. 51; *Fitch v. Scott*, 3 How. (Miss.) 314; *Isabet v. Lawson*, 1 Ga. 275.

McCles v. Stephenson, 3 Bibb (Ky.) 517; *Cox v. Sullivan*, 7 (Pa.) 50, 50 Am. Dec. 486; *Crooker v. Hutchinson*, 2 D. Chip. (Vt.) 117. And cases cited note 485, supra.

Wilcox v. Plummer, 4 Pet. (U. S.) 172.

Harter v. Morris, 18 Ohio St. 492; *Pennington's Ex'rs v. Yell*, 212, 52 Am. Dec. 262; *Hinckley v. Krug* (Cal.) 34 Pac. 118. *Head v. Patterson*, 11 Lea (Tenn.) 430. See *Jackson v. Clough*, Ala. 29.

client from the attorney's negligence or want of skill is on the client. He must affirmatively show that he had a valid claim against a solvent debtor, which has been lost or impaired by the negligence or misconduct of the attorney;⁴⁹² for unless this be shown, the attorney is liable only for nominal damages.⁴⁹³ The amount of damages in any particular case is a question for the jury to determine from the facts and circumstances in that case.⁴⁹⁴

§ 665. Liability where attorney acts gratuitously.

When an attorney has been negligent or unskillful in his duties to his client, and has been sued for consequent injury to the latter, he cannot set up as a defense the fact that he was acting gratuitously. There was no obligation on him to undertake the business or to act at all, but if he does so, he must use the same degree of care, skill, and diligence as though he were being paid for his services, and for failing to do so he will be liable for the loss sustained thereby.⁴⁹⁵

§ 666. Liability where attorney exceeds his authority.

If an attorney at law exceeds his authority or acts without authority, or violates any express instructions given to him by his client, he is liable for any loss the latter may sustain.

⁴⁹² *Suydam v. Vance*, 2 McLean, 99, Fed. Cas. No. 13,657; *Pennington's Ex'rs v. Yell*, 11 Ark. 212, 52 Am. Dec. 262; *Hinckley v. Kr* (Cal.) 34 Pac. 118; *Cox v. Sullivan*, 7 Ga. 144, 50 Am. Dec. 38; *Batty v. Fout*, 54 Ind. 482; *Cullison v. Lindsay*, 108 Iowa, 12; *Eccles v. Stephenson*, 3 Bibb (Ky.) 517; *Spiller v. Davidson*, 4 Minn. Ann. 171; *Joy v. Morgan*, 35 Minn. 184; *Harter v. Morris*, 18 Ohio St. 492; *Bruce v. Baxter*, 7 Lea (Tenn.) 477; *Collier v. Pulliam*, 13 Lea (Tenn.) 114; *Crooker v. Hutchinson*, 2 D. Chip. (Vt.) 11; *Staples' Ex'rs v. Staples*, 85 Va. 76. See, also *Phillips v. Eds*, 127 Ill. 535.

⁴⁹³ *Pennington's Ex'rs v. Yell*, 11 Ark. 212, 52 Am. Dec. 262; *Lea v. Boyd*, 72 Ga. 83.

⁴⁹⁴ *Crooker v. Hutchinson*, 2 D. Chip. (Vt.) 117; *Godefroy v. J*, 5 Moore & P. 284; *Russel v. Palmer*, 2 Wils. 325; *Eccles v. Stephenson*, 3 Bibb (Ky.) 517; *Hogg v. Martin*, *Riley* (S. C.) 156.

⁴⁹⁵ *Bourne v. Diggles*, 2 Chit. 311; *Whitehead v. Greetham*, *Bing*, 464; *Donaldson v. Haldane*, 7 Clark & F. 762; *Eccles v. Stephenson*, 3 Bibb (Ky.) 517; *Lawall v. Groman*, 180 Pa. 532, *Am. St. Rep.* 662; *Stephens v. White*, 2 Wash. (Va.) 203.

same as in the case of other agencies.⁴⁹⁶ Thus, where as a claim sent to him for collection and he indulges the or too far, contrary to instructions, by reason of which client suffers a loss, the attorney would be liable there-⁴⁹⁷ Likewise where he appears in a case without any ority, whereby the assumed client has to pay costs,⁴⁹⁸ here he disobeys instructions to bring an action at once, the claim is lost thereby,⁴⁹⁹ he would be liable for the ting loss to the client.

7. Liability for money collected.

n attorney who has collected money for his client is d to pay it over, or account for it, to the latter within a nable time, or at least when demanded; and for a fail- or refusal to do so he is liable for the loss, and the client in the absence of statute, treat the attorney's acts as a ersion and sue in trover for its recovery, or he may main- an action of assumpsit for money had and received to use.⁵⁰⁰ If the attorney makes the collection and conver-

Gilbert v. Williams, 8 Mass. 51, 5 Am. Dec. 77; Chatfield v. neon, 92 N. Y. 209; Post v. Charlesworth, 66 Hun (N. Y.) Belliveau v. Amoskeag Mfg. Co., 68 N. H. 225, 73 Am. St. Rep.

Gilbert v. Williams, 8 Mass. 51, 5 Am. Dec. 77; Cox v. Living- 2 Watts & S. (Pa.) 103, 37 Am. Dec. 486.

O'Hara v. Brophy, 24 How. Pr. (N. Y.) 379; Hubbart v. Phil- 13 Mees. & W. 702; Mudry v. Newman, 1 Crompt. M. & R. 402. e an attorney, in disregard of his instructions, agreed to the nuance of a case, by reason of which the client was obliged to costs of continuance, it is a good defense to the attorney's n for fees. O'Halloran v. Marshall, 8 Ind. App. 394. People v. Cole, 84 Ill. 327. See, also, Gilbert v. Williams, 8 51, 5 Am. Dec. 77.

Houston v. Frazier, 8 Ala. 81; Cameron v. Clarke, 11 Ala. 259; s v. Peck, 10 Ala. 142; Burke's Adm'r v. Stillwell, 23 Ark. 294; v. Hempstead, 25 Ark. 462; McRaven v. Dameron, 82 Cal. 57; ot v. Lawson, 1 Ga. 275; Hawkins v. Smith, 56 Ga. 571; Chap- v. Burt, 77 Ill. 337; Pfau v. Fullenwider, 102 Ill. App. 499; v. Bamberger, 110 Ind. 536; Black v. Hersch, 18 Ind. 342, n. Dec. 362; Dawson v. Compton, 7 Blackf. (Ind.) 421; Voas v. pp, 5 Kan. 59; Roberts v. Armstrong, 1 Bush (Ky.) 263, 89 Am. 624; Newcastle v. Bellard, 3 Me. 369; Grayson v. Wilkinson, 5

sion after the client's death, the latter's administrator may maintain an action for the money converted.⁵⁰¹ Or if he misleads his client into the acceptance of a smaller sum than that collected for her by him, he is liable for the balance.⁵⁰² But the client must prove that the money or some

Smedes & M. (Miss.) 268; *Houx v. Russell*, 10 Mo. 246; *Taylor v. Bates*, 5 Cow (N. Y.) 376; *Lillie v. Hoyt*, 5 Hill (N. Y.) 395, 40 Am Dec. 360. The attorney cannot refuse to pay over the money because of a dispute on account of his fees. *Conyers v. Gray*, 67 Ga. 329. Where attorneys receive, in their capacity as such, moneys of a client they must account to him for all of it except a reasonable sum for counsel fees and disbursements; and this right to an accounting will not be denied the client because of their interposition of technical objections. *In re Keen*, 39 Misc. (N. Y.) 374.

But in a late New York case, where an attorney collected money for his client, and deposited it in a bank to his own credit and mixed it with his own funds, it was held that the attorney was not guilty of a conversion, and the proper action against him was not an action of trover, but an action for an accounting, the court saying: "The money so received is not the client's property, and the attorney's obligation regarding the same is one resting upon contract, merely, to account for it and pay over such sum as upon an accounting shall be found to be due from him thereon. And even if he neglects to so account and pay over after a demand has been made he is not liable as for a conversion of such amount." *Jackson v. Moore*, 72 App. Div. (N. Y.) 217, citing *Walter v. Bennett*, 16 N. Y. 250. And see *Kelley v. Repetto*, 62 N. J. Eq. 246. But compare *Pfau v. Fullenwider*, 102 Ill. App. 499.

In Code states, the courts may entertain summary proceedings by a client against his attorney to compel payment of money received for his client. This proceeding is based on the principle that the court has power "over its own officers to prevent them from, or punish them for, committing acts of dishonesty or impropriety calculated to bring contempt upon the administration of justice." *Schell v. New York*, 128 N. Y. 67; *Union Bldg. & Sav. Ass'n v. Soderquist*, 115 Iowa, 695. But "it is not an absolute right that the client has to invoke this severe and summary remedy against the attorney, but one always subject to discretion. It is for the court to say when and under what circumstances it will entertain such proceedings, against its officers, upon the application of the client." *Schell v. New York*, 128 N. Y. 67; *In re H—*, 87 N. Y. 521; *In re Paschal*, 10 Wall. (U. S.) 483.

⁵⁰¹ *Clegg v. Bamberger*, 110 Ind. 536.

⁵⁰² *Riegl v. Phelps*, 4 N. D. 272; *Maloney v. Terry*, 70 Ark. 189.

g instead of money has been actually collected by the attorney upon the claim given to him, and that it has not been turned over.⁵⁰³

If the money comes into the attorney's hands at such a time that it is impossible or inconvenient to pay it to his client, and it becomes necessary to deposit it in some bank, he should do so in such a manner as to indicate that it was the principal's money. He should deposit it in his client's name or in his own name as trustee for his client; for if he deposits it in his own name, though in a separate account, and it is lost, through failure of the bank, he is liable to his client for the loss.⁵⁰⁴ But if the attorney has acted in good faith to the best of his skill, he will not be liable if the money is lost by reason of the default or acts of third persons.⁵⁰⁵ Usually, before an action can be maintained against an attorney for money collected by him, and not paid over to the client, a demand and refusal must be alleged and proved, and circumstances that would dispense therewith must be shown.⁵⁰⁶ But where the attorney has converted the money

Peay v. Ringo, 22 Ark. 68; *Horn v. Hamilton*, 89 Cal. 276; *Don v. Russ*, 20 Me. 421; *Palmer v. Ashley*, 3 Ark. 75; *Hillebrandt v. Every*, 33 App. Div. (N. Y.) 191.

Naltner v. Dolan, 108 Ind. 500, 58 Am. Rep. 61. But see *Jack v. Moore*, 72 App. Div. (N. Y.) 217.

Rogers v. Hopkins, 70 Ga. 454; *Pidgeon v. Williams*, 21 Grat. 251; *Kimmell v. Bittner*, 62 Pa. 203; *Ewing v. Freeman*, 103 Ill. 811.

Mardis' Adm'rs v. Shackleford, 4 Ala. 493; *Jett v. Hempstead*, 1 Ark. 464; *Whitehead v. Wells*, 29 Ark. 99; *Cox v. Delmas*, 99 Ill. 104; *Chapman v. Burt*, 77 Ill. 337; *Black v. Hersch*, 18 Ind. 81 Am. Dec. 362; *Claypool v. Gish*, 108 Ind. 424; *Kyser v. Wells*, 108 Ind. 261; *Johnson v. Semple*, 31 Iowa, 49; *Voss v. Bachop*, 5 Ky. 59; *Roberts v. Armstrong*, 1 Bush (Ky.) 263, 89 Am. Dec. 624; *Deinan v. Southern M. L. Ins. Co.*, 14 Bush (Ky.) 197; *Staples v. Staples*, 4 Me. 532; *Coffin v. Coffin*, 7 Me. 298 (this case seems so old contrary to the general rule that a demand is necessary, but the special circumstances of the case evidently excused it); *Wadlee v. Boyd*, 37 Mo. 180; *Fletcher v. Cummings*, 33 Neb. 793; *For v. Bates*, 5 Cow. (N. Y.) 376; *Banner v. D'Auby*, 34 Misc. (N. Y.) 525; *Krause v. Dorrance*, 10 Pa. 462, 51 Am. Dec. 496; *Den v. Watts*, 59 S. C. 81; *Taylor v. Armstead*, 3 Call (Va.)

to his own use,⁵⁰⁷ or has delayed for an unreasonable length of time to pay it over, and has given no good explanation of his conduct,⁵⁰⁸ or where he has agreed in advance to pay over the amount when collected to the creditors of his client,⁵⁰⁹ an action may be maintained against him without any previous demand.

§ 668. Liability for interest.

As a general rule, an attorney is not liable for interest on money collected by him, until a demand has been made therefor and he has refused to pay it over,⁵¹⁰ unless he has special instructions to pay it over as fast as collected,⁵¹¹ or unless he has unreasonably delayed in paying it over, without an explanation;⁵¹² or unless he has wrongfully converted it,⁵¹³ or tenders an insufficient amount to his client after deducting his fees.⁵¹⁴ But if the delay in paying it over has been caused by no act of the attorney, he will not be liable for interest thereon.⁵¹⁵ So if the client gives his attorney money to invest, and he appropriates it to his own use, he must pay therefor the best rate of interest that could be secured at the time,⁵¹⁶ or if he invests it and takes insufficient security, he

⁵⁰⁷ *Chapman v. Burt*, 77 Ill. 337. See *Jordan v. Westerman*, 6 Mich. 170, 4 Am. St. Rep. 836, where a contract by a wife to pay her solicitors one-half of alimony recovered in a suit, was held void as against public policy, and no previous demand was necessary in order for her to maintain an action to recover the amount retained under such contract.

⁵⁰⁸ *Chapman v. Burt*, 77 Ill. 337; *Dwight v. Simon*, 4 La. Ann. 490.

⁵⁰⁹ *Mardis' Adm'rs v. Shackelford*, 4 Ala. 493.

⁵¹⁰ *Sneed v. Hanly*, Hempst. 659, Fed. Cas. No. 13,136; *Nisbet Lawson*, 1 Ga. 275; *Hawkins v. Smith*, 56 Ga. 571; *Walpole's Adm'r v. Bishop*, 31 Ind. 156; *Johnson v. Semple*, 31 Iowa, 49; *State Ampt*, 6 Ohio Dec. 699.

⁵¹¹ *Hauxhurst v. Hovey*, 26 Vt. 544.

⁵¹² *Chapman v. Burt*, 77 Ill. 337; *Dwight v. Simon*, 4 La. Ann. 490.

⁵¹³ *Smith v. Alexander*, 87 Ala. 387; *Walpole's Adm'r v. Bishop*, 31 Ind. 156; *Mansfield v. Wilkerson*, 26 Iowa, 482.

⁵¹⁴ *Ketcham v. Thorp*, 91 Ill. 611.

⁵¹⁵ *Ewing v. Freeman*, 103 Ga. 811.

⁵¹⁶ *Rogers v. Priest*, 74 Wis. 538.

ble for any damages that result.⁵¹⁷ If the amount
 ed by the client is unliquidated, the attorney would be
 for interest only from the time of the institution of
 against him.⁵¹⁸ But an attorney who keeps money,
 ed by him for his client, safely, and has applied it to
 oductive use, and has always held himself in readiness
 y it over, is not liable for interest.⁵¹⁹

. Relation of attorney and client must exist.

order that the client may sustain an action for dam-
 against the attorney, by reason of the latter's negligence
 nt of skill in performing duties for him, he must first
 that the attorney had been retained by him to perform
 duties, and that the relation of attorney and client ex-
 between them at the time of such negligence. For until
 orney is employed to perform certain acts he cannot be
 gent or unskillful in their performance. There being
 ivity of contract, there is no obligation which he can
 , until such relation is shown. There must exist be-
 the party inflicting the injury and the party injured
 privity of contract, by reason of which the former is
 some obligation to the latter.⁵²⁰

angdon v. Godfrey, 4 Fost. & F. 445; Donaldson v. Haldane, 7
 & F. 762.

n re Wolf, 51 Hun (N. Y.) 415; Kane v. Smith, 12 Johns.
) 156.

Williams v. Storrs, 6 Johns. Ch. (N. Y.) 353, 10 Am. Dec. 340.

National Sav. Bank of D. C. v. Ward, 100 U. S. 195; Fish v.

17 C. B. (N. S.) 194; Robertson v. Fleming, 4 Macq. H. L.

67; Buckley v. Gray, 110 Cal. 339, 52 Am. St. Rep. 88; Cavil-

r. Yale, 3 Cal. 108, 58 Am. Dec. 388 (declaration need only

that he was retained); Hillegass v. Bender, 78 Ind. 225;

s v. Davis, 113 Iowa, 529; Watson v. Calvert Bldg. & Loan

91 Md. 25; Gott v. Brigham, 41 Mich. 227; McCreary v.

s, 25 Miss. 428; Fenaille v. Coudert, 44 N. J. Law, 286; In

llebrandt, 33 App. Div. (N. Y.) 191; Currey v. Butcher, 37

0. See Roddy v. Missouri Pac. R. Co., 104 Mo. 234, 24 Am.

ep. 333. An attorney who procures employment for another

ey, at the latter's request and upon his promise to pay to

one-half of his fee, cannot maintain a summary proceeding

at the latter attorney to compel him to pay over such one-half,

e relation of attorney and client did not exist between them,

Thus a son cannot recover of an attorney damages suffered by him through the negligence of the attorney in the preparation of a will of the mother of the son, the employment being by the mother, not by the son.⁵²¹ So where A, an attorney at law, employed and paid solely by B, to examine and report on the title of the latter to a certain lot of ground, gave on his signature this certificate, "B's title to the lot," etc., good, and the property is unencumbered." C, with whom A had no contract or communication, relied upon the certificate as true, and loaned money to B, upon the latter executing by way of security a deed of trust for the lot. B, before employing A, had transferred the lot in fee by a duly recorded conveyance, a fact which A, on examining the records, could have ascertained, had he exercised a reasonable degree of care. The money loaned was not paid, and B was insolvent. It was held that there being neither fraud, collusion, or fraud in fact by A, nor privity of contract between him and C, A was not liable to the latter for any loss sustained by reason of the certificate.⁵²² And where the client brings an action against his attorney for giving improper advice, the burden is on the former to show that the attorney had been employed by him in reference to the matter about which the advice was given, and that it was given by him, as attorney.⁵²³ While an action to compel an attorney to pay over money cannot be maintained unless the relation of attorney and client existed between the parties when the attorney received the money, the client's successor in interest can compel payment, although the relation has never existed between the successor and the attorney.⁵²⁴

"The exceptions to this general rule, if they may be considered strictness deemed such, are where the attorney has been guided

and as it is only where such relation does exist that a summary proceeding to compel an attorney to pay over moneys may be maintained. *Matter of Hirshbach*, 72 App. Div. (N. Y.) 79; *Matter of Cattus*, 42 App. Div. (N. Y.) 134.

⁵²¹ *Buckley v. Gray*, 110 Cal. 339, 52 Am. St. Rep. 88.

⁵²² *National Sav. Bank of D. C. v. Ward*, 100 U. S. 195.

⁵²³ *Fish v. Kelly*, 17 C. B. (N. S.) 194, 112 E. C. L. 193; *Dartmouth v. Howard*, 6 Dowl. & R. 438, 4 Barn. & C. 345, 10 E. C. L. 609.

⁵²⁴ *In re Redmond*, 54 App. Div. (N. Y.) 454.

and or collusion, or of a malicious or tortious act. Re-
 sponsibility for a fraudulent act is independent of any con-
 tractual relation between the guilty party and the one in-
 jured, and one committing a malicious or tortious act to
 the injury of another is liable therefor, without reference to
 the question of privity between himself and the wronged
 party.

Defenses available to the attorney.

Although the client has a right of action against the at-
 torney for any damage sustained by him by reason of the
 negligence or want of skill of the attorney, yet the attorney
 under the circumstances of the particular case, have
 a defense that he can set up as a bar or in mitigation of
 damages claimed against him. The client may have his
 right of action, but the attorney may have rights that will
 defeat the client's rights.

It is a well recognized rule of law that in case of profes-
 sional negligence or misconduct a cause of action
 accrues at the time of such acts or omissions that constitute
 negligence or misconduct; and it is from this time that
 the statute of limitations begins to run and not from the con-
 tractual injury.⁵²⁶ Of course there are circumstances un-
 der which the running of the statute is suspended for the
 time being, as in case of war, or absence of the guilty party
 from the state or in case of fraud. These statutes apply as
 to the breach of an attorney's duty towards his client
 as to any other professional misconduct.⁵²⁷ Therefore if a
 client wishes to recover from his attorney for any loss caused
 by the attorney's unskillfulness or negligence, he must bring
 his action before it is barred by the expiration of that time
 prescribed by the statute for similar cases. He cannot let

Van Fleet, J., Buckley v. Gray, 110 Cal. 339, 52 Am. St.

Smith v. Fox, 6 Hare, 386, 12 Jur. 130; Mardis' Adm'rs v.
Ford, 4 Ala. 495; White v. Reagan, 32 Ark. 281; Derrickson
7 Pa. 27; Downey v. Garard, 24 Pa. 52; Smith v. Owen, 7
Conn. 53; Wilcox v. Plummer's Ex'rs, 4 Pet. (U. S.) 172.
White v. Reagan, 32 Ark. 281; Rhines' Adm'rs v. Evans, 66 Pa.
100; m. Rep. 364; Hays v. Ewing, 70 Cal. 127.

& S.—93.

his right lie dormant for an indefinite time, and then institute his action, perhaps, many years after it has accrued. The law prescribes a definite time, during which, even up to the last day, he may begin his action and thus protect his rights. But if he does not do so, but lets it run on until the limit is passed, and then seeks to recover from the attorney the latter, if he so chooses, may effectually bar the client's action by pleading the statute.⁵²⁸ The actions against attorneys to which the statutes apply, except in special instances, are generally for the attorney's negligence or want of skill for failing to use that reasonable degree of skill, care and diligence due by him to his client in the management of affairs entrusted to him by his client.⁵²⁹ Thus the attorney may plead the statute of limitations in an action brought against him by his client for money collected by the attorney but not paid over to the client.⁵³⁰ In such case the statute begins to run from the time the attorney should have paid over, if there has been no fraudulent concealment of the receipt of the money.⁵³¹ If a demand has been made of the attorney, it begins to run from the time of such demand or refusal.⁵³² If no demand, then from the time notice has been acquired that the money has been collected.⁵³³

⁵²⁸ *Moore v. Juvenal*, 92 Pa. 484; *People v. Brotherson*, 36 B. (N. Y.) 662; *Stafford v. Richardson*, 15 Wend. (N. Y.) 302; *Kinney's Ex'rs v. McClure*, 1 Rand. (Va.) 287; *Leigh v. Williams*, 64 Ark. 165.

⁵²⁹ *Bruce v. Baxter*, 7 Lea (Tenn.) 479; *Smith v. Owen*, 7 (Tenn.) 53; *Mardis' Adm'rs v. Shackelford*, 4 Ala. 493; *Whitehead v. Reagan*, 32 Ark. 281; *Hays v. Ewing*, 70 Cal. 127; *Cook v. Rives*, 13 Smedes & M. (Miss.) 329, 53 Am. Dec. 88; *People v. Brotherson*, 36 Barb. (N. Y.) 662; *Wilcox v. Plummer's Ex'rs*, 4 Pet. (U. S.) 188; *Hawkins v. Walker*, 4 Yerg. (Tenn.) 188.

⁵³⁰ *Cook v. Rives*, 13 Smedes & M. (Miss.) 328, 53 Am. Dec. 88.

⁵³¹ *Stafford v. Richardson*, 15 Wend. (N. Y.) 302; *Kinney's Ex'rs v. McClure*, 1 Rand. (Va.) 287; *Cook v. Rives*, 13 Smedes & M. (Miss.) 329, 53 Am. Dec. 88; *Hawkins v. Walker*, 4 Yerg. (Tenn.) 188; *Douglas v. Corry*, 46 Ohio St. 349, 15 Am. St. Rep. 604.

⁵³² *Benton v. Craig*, 2 Mo. 198; *Denton's Ex'rs v. Embury*, 64 Ark. 228; *Roberts v. Armstrong*, 1 Bush (Ky.) 263, 89 Am. Dec. 624.

⁵³³ *Voss v. Bachop*, 5 Kan. 59; *Leigh v. Williams*, 64 Ark. 165; *Whitehead v. Wells*, 29 Ark. 99; *Schofield v. Woolley*, 98 Ga.

he receives payment of a judgment which he had no right to receive, the right of action accrues as soon as payment is made.⁵³⁴ But if the attorney, by false representations, conceals from his client the fact that he has used the client's money, the cause of action does not accrue until the discovery of that fact.⁵³⁵

Where the action is brought against the attorney for negligence in conducting a case, he may plead in defense that the client failed to instruct him what sort of a defense should be made, or otherwise failed to give him such information as would have materially aided him in the case; and if he makes out his defense he will not be liable.⁵³⁶ So where an action is charged against him is his failure to file a writ of execution in time to file it.⁵³⁷ And again where an action is brought for negligence in failing to have an execution issued on the property of the judgment debtor before the judgment lien expired, he may defend by showing that no other property belonged to the judgment debtor.⁵³⁸

V. DEALINGS BETWEEN ATTORNEY AND HIS CLIENT.

In general.

As has been seen heretofore, the relation between an attorney and his client is one of special trust and confidence.⁵³⁹ The attorney by reason of his retainer is in such a position that he has such an influence over his client that oftentimes, if he so desired, he could use such influence, and abuse the confidence reposed in him, to the great detriment of his client, and to his own advantage. For this reason the policy of the law is clearly opposed to contracts or dealings between an attorney and his client in relation to property or matters in

St. Rep. 315; Wilder v. Secor, 72 Iowa, 161, 2 Am. St. Rep.

Smith v. Owen, 7 Lea (Tenn.) 53.

Cross v. Bachop, 5 Kan. 59.

Wenton v. Craig, 2 Mo. 198; Salisbury v. Gourgas, 10 Metc. 442.

Stephens v. White, 2 Wash. (Va.) 203.

Haddall v. Haight, 132 Cal. 320.

Boff v. Irvine, 108 Mo. 378, 32 Am. St. Rep. 609.

litigation. The value of property depends to a great extent upon the certainty of its title, as to which the attorney, from the nature of his profession, is supposed to be more competent to judge than the client. It would, then, be contrary to the principles of justice and equity to allow the attorney to use his superior knowledge to his client's detriment. And in order that the attorney may properly discharge his duty to his client must commit to him all the information he possesses in regard to the subject-matter of the employment. The relation begets the most unlimited confidence, for without it the client's interests are endangered; and to permit the attorney to use those means to the prejudice of the client would be to subject the latter to what is aptly enough termed a "crushing influence." It is the policy of the law, therefore, to require that all dealings between an attorney and his client while the relation exists, shall be characterized by the utmost fairness and good faith, and to scrutinize very closely all transactions between them; and not to permit the attorney to retain any undue advantage over his client which his retainer enabled him to acquire, and the burden of proof is on the attorney to show that every transaction between him and his client is fair, honest, and honorable.⁵⁴⁰

⁵⁴⁰ *Savery v. King*, 5 H. L. Cas. 627, 25 Law J. Ch. 482; *Parker v. Attorney General for Gibraltar*, L. R. 5 P. C. 516; *Baker v. Humphrey*, 101 U. S. 494; *Dickinson v. Bradford*, 59 Ala. 58; 10 Am. Rep. 23; *Kisling v. Shaw*, 33 Cal. 425, 91 Am. Dec. 644; *Ford v. Le Breton*, 92 Cal. 457; *Cox v. Delmas*, 99 Cal. 104; *Mills v. Mills*, 26 Conn. 213; *Elmore v. Johnson*, 143 Ill. 513, 36 Am. Rep. 401; *Jennings v. McConnel*, 17 Ill. 148; *Sutherland v. R. Co.*, 151 Ill. 384; *Ross v. Payson*, 160 Ill. 349; *Cassem v. Heustis*, 151 Ill. 208, 94 Am. St. Rep. 160; *West v. Raymond*, 21 Ind. 305; *West v. Ashton*, 42 Iowa, 365; *Polson v. Young*, 37 Iowa, 196; *Cunha v. Jones*, 37 Kan. 477, 1 Am. St. Rep. 257; *Yeamans v. Jones*, 37 Kan. 195; *Bibb v. Smith*, 1 Dana (Ky.) 580; *Dodge's Adm. v. Foulks*, 11 B. Mon. (Ky.) 178; *Burnham v. Haselton*, 82 Me. 178; *Gray v. Emmons*, 7 Mich. 533; *Cleine v. Englebrecht*, 41 N. J. 498; *Dunn v. Dunn*, 42 N. J. Eq. 431; *Mason v. Ring*, 2 Abb. (N. S.; N. Y.) 322; *Berrien v. McLane*, 1 Hoff. Ch. (N. Y.) 161; *Haught v. Moore*, 37 N. Y. Super. Ct. 161; *Starr v. Vanderheyden*, 9 Johns. (N. Y.) 253, 6 Am. Dec. 275; *Powell v. Willamette V. Co.*, 15 Or. 393; *Ah Foe v. Bennett*, 35 Or. 231; *Henry v. Ralston*, 25 Pa. 354, 64 Am. Dec. 703; *Darlington's Estate*, 147 Pa. 62.

ment of this confidential relation existing between attorney and client that transactions between them are often called secret, which would be deemed to be unobjectionable between other parties.⁵⁴¹

The principles have been well stated by an eminent text-writer as follows: "It is obvious that this relation must rest upon great confidence between the parties, and to very great influences over the actions and rights and interests of the client. The situation of an attorney or solicitor puts it in his power to avail himself not only of the necessities of the client, but of his good nature, liberality, and credulity to procure undue advantages, bargains, and gratuities. Hence the law, with a wise providence, not only watches over all transactions of parties in this predicament, but it often refuses to declare transactions void which between other parties would be unobjectionable. It does not so much condemn the bearing or hardship of its doctrine upon particular cases as it does the importance of preventing a general public mischief which may be brought about by means, secret and inaccessible to judicial scrutiny, from the dangerous influence arising from the confidential relation of the parties.

* On the one hand it is not necessary to establish that there has been fraud or imposition upon the client; and on the other hand it is not necessarily void throughout, *ipso facto*. But the burthen of establishing its perfect fairness, justice, and equity is thrown upon the attorney, upon the rule that he who bargains in a matter of advantage to a person placing a confidence in him is bound to show that reasonable use has been made of that confidence."⁵⁴² Before or after the relation. Before the attorney un-

Rep. 776; *Miles v. Ervin*, 1 McCord (S. C.) 524, 16 Am. Dec. 30; *Taylor v. Barker*, 30 S. C. 238; *Rose v. Mynatt*, 7 Yerg. 30; *Cooper v. Lee*, 75 Tex. 114; *Thomas v. Turner's Adm'r*, 18 Wash. 311; *Gaffney v. Jones*, 18 Wash. 311; *Vanasse v. Reid*, 111 Wis. 100, where a judgment was entered by an attorney by consent against his client, partly for costs, an inquiry was ordered into the consideration, and proceedings stayed in the meantime. *Vanderheyden*, 9 Johns. (N. Y.) 253, 6 Am. Dec. 275. *More v. Johnson*, 143 Ill. 513, 36 Am. St. Rep. 401. *Id.*, Eq. Jur. §§ 310, 311.

dertakes the business of the client, he may contract with reference to his services, if the contract be fair and the consideration ample, because no confidential relation then exists and the parties deal with each other at arm's length. And the same is true in regard to dealings which take place after the relation has been dissolved.⁵⁴³ Thus, after the litigation is ended, an attorney may lawfully contract for remuneration out of the subject of the suit, even where such contract, if previously made, would be regarded as champertous.⁵⁴⁴ But it is a mistake to suppose that the attorney is at liberty to violate the professional confidence reposed in him by his client the moment the relation of counsel and client terminates.⁵⁴⁵

This rule is not limited to the case of attorney and client but applies as well to transactions between principal and agent, trustee and cestui que trust, guardian and ward, parent and child, and generally to all cases where a relation of confidence exists between the parties; and the general principle governing this class of cases and forming the basis of the rule is that, if confidence is reposed and that confidence is abused and the other party thereby suffers an injury, the court will grant relief.⁵⁴⁶

§ 672. Not necessarily invalid.

But it does not necessarily follow that every contract or transaction between persons occupying the relation of attorney and client, and about such a subject-matter, is absolutely void; nor does it seem that the current of decisions sustains such a conclusion. Neither of the parties is supposed to be subject to any of those legal personal disabilities which incapacitate them from contracting, and prima facie they will be bound by their contracts; and when a rule of law is imposed to avoid, or to enforce its fulfillment, if it is executed on the maxim *cessante ratione cessat ipsa lex*, we are left

⁵⁴³ *Elmore v. Johnson*, 143 Ill. 513, 36 Am. St. Rep. 401; *Bing v. Salene*, 15 Or. 208, 3 Am. St. Rep. 152.

⁵⁴⁴ *Walker v. Cuthbert*, 10 Ala. 213.

⁵⁴⁵ *Henry v. Ralman*, 25 Pa. 354, 64 Am. Dec. 705.

⁵⁴⁶ *Kisling v. Shaw*, 33 Cal. 425, 91 Am. Dec. 644.

whether the case is within the reason of the rule. The inquiry the jealousy with which the law views such a fact is ready to lend its aid in support of perhaps trivial instances tending to bring the case within the rule. But danger to which the client is exposed, from the supposed advice which his attorney has over him, is the reason on which it proceeds; and the inquiry is whether he has or has not been subjected to the client's prejudice; and if it should appear that the client was as well, or better, advised than his attorney in matters connected with the transaction, which, without prejudice to the profession, does frequently happen, and if he has received a full and adequate consideration, there is no fraud or injustice in sustaining such a contract, although the parties should ask to be absolved from it.⁵⁴⁷ Independent advice to the client is not necessary in all transactions, where the client is in a position to form a perfectly free and unfettered judgment independent altogether of any sort of control.⁵⁴⁸ Thus the fact that a note given by a client to his attorney during the existence of such relations will not make it invalid where it is shown that it was given for a consideration,⁵⁴⁹ as in payment of services performed.⁵⁵⁰

Burden of proof is on attorney.

Where, then, the attorney bargains with his client in a material advantage to himself, it is incumbent on him to show that the transaction is fair and equitable; that he fully and honestly discharged his duties to his client, without misrepresentation or concealment of any fact material to the client,

Allen v. Allen, 2 Dow, 289; *Harris v. Tremenheere*, 15 Ves. 42; *Waite v. Whitney*, 50 Fed. 668; *Ware v. Russell*, 70 Ala. 174, 18 Ala. Rep. 82; *Kidd v. Williams*, 132 Ala. 140; *Donahoe v. Chiricket Club*, 177 Ill. 351; *Yeamans v. James*, 27 Kan. 195; *Stith*, 11 Ky. L. R. 216, 11 S. W. 810; *McElrath v. Dupuy*, 100 Ann. 520; *Starr v. Vanderheyden*, 9 Johns. (N. Y.) 253, 6 Johns. Dec. 275; *Bingham v. Salene*, 15 Or. 208, 3 Am. St. Rep. 152; *Bennett v. Bennett*, 35 Or. 231; *Miles v. Ervin*, 1 McCord Ch. (S. C.) 100, 101 Am. Dec. 623. *Kidd v. Williams*, 132 Ala. 140, 56 L. R. A. 879. *Busins v. Partridge*, 79 Cal. 225. *Hard v. Yancey*, 78 Ill. App. 368.

and that the client was fully informed of his rights and interests in the subject-matter of the transaction, and the nature and effect of the transaction, and was so placed as to be able to deal with the attorney at arm's length.⁵⁵¹ But this rule does not apply when the only question to be decided is one of the construction of the contract,⁵⁵² or where the transaction is simply the giving of a note in payment of legal services performed.⁵⁵³

§ 674. Contracts between attorney and client.

The above general rule applies with special force to contracts entered into between an attorney and his client, where by the former acquires some interest in the subject-matter of the agency. The courts will closely scrutinize all such contracts, and if it appears that in making a contract in reference to the subject-matter of the agency, the attorney has used his position and influence to gain an advantage over his client, such contract may be avoided by the latter, if he has

⁵⁵¹ *Gibson v. Jeyes*, 6 Ves. 266; *Savery v. King*, 5 H. L. Cas. 62; 25 Law J. Ch. 482; *Rogers v. Marshall*, 3 McCrary, 76, 9 Fed. 72; *United States v. Coffin*, 83 Fed. 337; *Dickinson v. Bradford*, 59 Ala. 581, 31 Am. Rep. 23; *Kisling v. Shaw*, 33 Cal. 425, 91 Am. Dec. 64; *Felton v. Le Breton*, 92 Cal. 457; *Morrison v. Smith*, 130 Ill. 30; *Jennings v. McConnel*, 17 Ill. 148; *Willin v. Burdette*, 172 Ill. 11; *Elmore v. Johnson*, 143 Ill. 513, 36 Am. St. Rep. 401; *Faris v. Briscoe*, 78 Ill. App. 242; *French v. Cunningham*, 149 Ind. 63; *Ryan v. Ashton*, 42 Iowa, 365; *Matthews v. Robinson*, 7 Kan. App. 118; *Yeamans v. James*, 27 Kan. 195; *Carter v. West*, 93 Ky. 21; *Dunn v. Record*, 63 Me. 17; *Burnham v. Heselton*, 82 Me. 49; *Merryman v. Euler*, 59 Md. 588, 43 Am. Rep. 564; *Whipple v. Barton*, 63 N. H. 613; *Condit v. Blackwell*, 22 N. J. Eq. 481; *Porter v. Bergen*, 54 N. J. Eq. 405; *Howell v. Ransom*, 11 Paige (N. Y.) 538; *Evans v. Ellis*, 5 Denio (N. Y.) 640; *Haight v. Moore*, 37 N. Y. Super. Ct. 161; *Couse v. Horton*, 23 App. Div. (N. Y.) 198; *Brooks v. Barnes*, 40 Barb. (N. Y.) 521; *Bingham v. Salene*, 15 Or. 208, 10 Am. St. Rep. 152; *Greenfield's Estate*, 14 Pa. 490; *Darlington's Estate*, 147 Pa. 624, 30 Am. St. Rep. 776; *Miles v. Ervin*, 1 McCrary, 14 Ch. (S. C.) 524, 16 Am. Dec. 623; *Planters' Bank v. Hornberger*, 10 Cold. (Tenn.) 531; *Cooper v. Lee*, 75 Tex. 114; *Thomas v. Turner*, 87 Va. 1; *Vanassee v. Reid*, 111 Wis. 303.

⁵⁵² *Wallace v. Town*, 8 Wash. 244; *Willoughby v. Mackall*, 1 App. D. C. 411.

⁵⁵³ *Ward v. Yancey*, 78 Ill. App. 368.

ferred any injury thereby.⁵⁵⁴ Contracts between attorney and client are not voidable for fraud alone, like those between trustee and cestui que trust, but it must be shown in addition that injury resulted to the client from the fraud.⁵⁵⁵ It is not enough to entitle the client to relief against the attorney, in a case, it is not enough for him to show that the relation between attorney and client existed, and that during the existence of the relation the parties entered into a contract, the client being induced thereto by the abuse of confidence by the attorney; but it must be alleged and proved that the client has suffered injury through the abuse of confidence.⁵⁵⁶ It will be seen, therefore, from an examination of the cases, that although it might be inferred from the generality of the expression, that the fact of the contract being between client and attorney was sufficient to avoid it, yet in those cases in which relief has been given there were some circumstances showing the influence which the relationship of the parties had over the contract, furnished either by some positive act of fraud, or deducible from its equality. It may, therefore, be concluded that all contracts between attorney and client, in relation to the property in litigation, are not necessarily voidable on the ground of that relationship; but to render it so it must appear that the relation was used to the prejudice of the client.⁵⁵⁷

In order, then, that the client may secure relief from such a contract, it is not necessary that he should prove actual fraud or imposition on the part of the attorney; but if it is shown to be a contract in which the relation between the parties was such that the attorney exerted or might have ex-

Miles v. Ervin, 1 McCord Ch. (S. C.) 524, 16 Am. Dec. 623; *Birmingham v. Jones*, 37 Kan. 477, 1 Am. St. Rep. 257; *Henry v. Alaman*, 25 Pa. 354, 64 Am. Dec. 703; *Burnham v. Heselton*, 82 N. H. 495. And see cases cited in preceding sections. An agreement between a mortgagor and mortgagee to extinguish the equity of redemption cannot stand when the latter for years was the legal owner of the former in reference to the lands involved and other property. *Cassem v. Heustis*, 201 Ill. 208, 94 Am. St. Rep. 160.

Kisling v. Shaw, 33 Cal. 425, 91 Am. Dec. 644.

Kisling v. Shaw, 33 Cal. 425, 91 Am. Dec. 644; *Miles v. Ervin*, 1 McCord Ch. (S. C.) 524, 16 Am. Dec. 623.

Miles v. Ervin, 1 McCord Ch. (S. C.) 524, 16 Am. Dec. 623.

erted an influence in his favor, the burden of establishing the fairness of the contract is upon the attorney. It is necessary, however, that the client make his application for relief within a reasonable time.⁵⁵⁸ He cannot remain silent for an unreasonable length of time, and then seek to obtain relief after others have perhaps acquired rights in the matter. What is a reasonable length of time will have to be determined from the facts of each particular case.

— **Illustrations.** Thus a contract entered into by an attorney and his client, after the relation has begun, giving to the attorney a larger compensation than was originally agreed upon, may be avoided, within a reasonable time, by the client to the extent of such excess beyond what the attorney's services are reasonably worth, unless good reasons are shown for the additional compensation.⁵⁵⁹ And a deed executed in pursuance of such a contract, securing to the attorney such additional compensation, may be set aside by the client by a suit commenced within a reasonable time.⁵⁶⁰ It has been held that if the title to property is so involved in litigation that the value of the property depends upon the decision as to such title, a contract between attorney and client made during the pendency of the litigation, to compensate the attorney for his legal services with part of the property involved, is voidable at the election of the client, irrespective of the fairness or unfairness of the contract, provided such election is exercised within a reasonable time.⁵⁶¹ The court in this case says: "There is a manifest distinction between a purchase by an attorney from a client and a contract, made during the pendency of a litigation, for the conveyance or transfer by the client to the attorney of a part of the property involved

⁵⁵⁸ *Elmore v. Johnson*, 143 Ill. 513, 36 Am. St. Rep. 401; *Sutherland v. Reeve*, 151 Ill. 384.

⁵⁵⁹ *Lecatt v. Sallee*, 3 Port. (Ala.) 115, 29 Am. Dec. 249; *White v. Tolliver*, 110 Ala. 300; *Dickinson v. Bradford*, 59 Ala. 581, 31 Ala. Rep. 23; *Elmore v. Johnson*, 143 Ill. 513, 36 Am. St. Rep. 401; *Bolton v. Dally*, 48 Iowa, 348; *Haight v. Moore*, 37 N. Y. Supp. Ct. 161; *Phillips v. Overton*, 4 Hayw. (Tenn.) 291; *Waterbury v. Laredo*, 68 Tex. 565; *Thomas v. Turner's Adm'r*, 87 Va. 1.

⁵⁶⁰ *Elmore v. Johnson*, 143 Ill. 513, 36 Am. St. Rep. 401.

⁵⁶¹ *Elmore v. Johnson*, 143 Ill. 513, 36 Am. St. Rep. 401.

the litigation as a compensation for his legal services therein. Where a purchase is proposed the client is always, to a certain extent, put on his guard. He knows that it is in the interests of the buyer to get the property as cheaply as possible. He has every motive to enquire into and learn the value of the thing to be sold. But in the case of the contract above indicated the client is at a great disadvantage. The value of the property in litigation depends upon the result of the litigation, and, being unable to understand the legal aspects of the case, he is unable to foresee what such result will be. He must rely not upon his own judgment, but upon the judgment and statements of the attorney. Moreover he is unable to judge of the value of his attorney's services, because he cannot know what legal steps are necessary to be taken in the conduct of the case. The advantage is overwhelmingly on the side of the attorney where such a contract is made."

— **Contracts of indemnity.** Contracts by which an attorney agrees to indemnify his client from all loss by reason of which suit is brought are not favored, and will not be enforced unless they are shown to have been made for a valuable consideration and the attorney is free from any illegal motives or purposes.⁵⁶² And where the attorney contracted to pay any final judgment that might be rendered against the client in the case, in consideration of which the client had appealed from a judgment, and agreed to pay him for services on such appeal, the contract is held void, and not enforceable by the client.⁵⁶³

75. Assignments to attorney.

So if the client makes an assignment of property to his attorney, during the continuance of the relation, especially if it is property in litigation, it will be presumed that the attorney used undue influence in securing such assignment, except to the extent that it operates as a payment of reasonable and proper fees will not be sustained, unless

⁵⁶² See *Lindsey v. Jones*, 23 Ala. 835; *Usher v. Sands*, 32 Ind. 302; *Adye v. Hanna*, 47 Iowa, 264, 29 Am. Rep. 484; *Wilkey v. Crane*, 17 Mich. 17; *Struckmeyer v. Lamb*, 64 Minn. 57; *Mitchell v. Bell*, 17 C. (Conf. 17) 244, 2 Am. Dec. 627; *Morrill v. Graham*, 27 Tex. 646.
⁵⁶³ *Adye v. Hanna*, 47 Iowa, 264, 29 Am. Rep. 484.

shown to be reasonable and obtained in good faith.⁵⁶⁴ This rule applies alike to all kinds of property, whether real or personal. Thus an assignment, by a client to his attorney, of a mortgage,⁵⁶⁵ judgment,⁵⁶⁶ cause of action,⁵⁶⁷ or of other claims or rights,⁵⁶⁸ is presumptively invalid. Such an assignment cannot be sustained by the attorney, or by his assignees with notice, as against the client's creditors, even where it was made for the express purpose of hindering and delaying such creditors. A court of equity will not sustain such a conveyance because the parties are not in *pari delicto*;⁵⁶⁹ though an innocent purchaser for value from the attorney will be protected.⁵⁷⁰

But it does not necessarily follow, from the mere fact of the relation, that all assignments from a client to his attorney are invalid, for although there is a presumption against their validity, it may be overcome by proof that the transaction was made in good faith, the client having independent advice and a full understanding of all the facts.⁵⁷¹

§ 676. Gifts from client to attorney.

So where a gift is made from a client to his attorney, the presumption is that it was obtained from the client through

⁵⁶⁴ Coffey v. Quint, 92 Cal. 475; Elmore v. Johnson, 143 Ill. 513; 36 Am. St. Rep. 401; Polson v. Young, 37 Iowa, 196; Dunn v. Record, 63 Me. 17; Merryman v. Euler, 59 Md. 588, 43 Am. Rep. 564; Colgan v. Jones, 44 N. J. Eq. 274; Porter v. Bergen, 54 N. J. Eq. 405; Howell v. Ransom, 11 Paige (N. Y.) 540; Ford v. Harrington, 16 N. Y. 285; Brock v. Barnes, 40 Barb. (N. Y.) 521; Ah Foe v. Bennett, 35 Or. 231; Planters' Bank v. Hornberger, 4 Cold. (Tenn.) 569; Marshall v. Joy, 17 Vt. 546.

⁵⁶⁵ Merryman v. Euler, 59 Md. 588, 43 Am. Rep. 564.

⁵⁶⁶ Morrison v. Smith, 180 Ill. 304.

⁵⁶⁷ Coffey v. Quint, 92 Cal. 475; Dunn v. Record, 63 Me. 17.

⁵⁶⁸ Lane v. Black, 21 W. Va. 617; Marshall v. Joy, 17 Vt. 546.

⁵⁶⁹ Goodenough v. Spencer, 15 Abb. Pr. (N. S.; N. Y.) 248; How. Pr. 347; Ford v. Harrington, 16 N. Y. 285; Place v. Haywood, 117 N. Y. 487; Herrick v. Lynch, 150 Ill. 283.

⁵⁷⁰ Goodenough v. Spencer, 15 Abb. Pr. (N. S.; N. Y.) 248, 46 Ill. Pr. 347.

⁵⁷¹ Cousins v. Partridge, 79 Cal. 225; Wharton v. Hammond, Fla. 934; Roman v. Mall, 42 Md. 513; Newberg v. Schwab, 49 Ill. Super. Ct. 232; Ah Foe v. Bennett, 35 Or. 231. See, also, Fish v. McInerney, 137 Cal. 28, 92 Am. St. Rep. 68.

due influence or fraud, and in order that it may be sustained, the burden of proof is on the attorney to show that it was not only voluntary, but that it was also made with a full knowledge of all the material facts, and without undue influence.⁵⁷² But it seems to be well settled that if such a gift, or agreement therefor, is made during the carrying on of business by the attorney for the client, it may be set aside even though it is proven to have been made in good faith, except in so far as it may be as security for his reasonable fees.⁵⁷³ It is an established rule in courts of equity, that no gift or gratuity to an attorney, beyond his fair professional demands, made during the time that he continues to conduct or manage the affairs of the donor, shall be permitted to stand; and more especially if such gift or gratuity issues immediately out of the subject then under the attorney's management.⁵⁷⁴ Thus an agreement between attorney and client, while the relation continues, by which the former reserves a gift to himself or a larger compensation than was stipulated for, is invalid, and its enforcement will be restrained.⁵⁷⁵ A promise by a prisoner, during the relation of attorney and client, to confer upon the attorney a gratuity, in addition to a stipulated fee, is unenforceable.⁵⁷⁶

377. Purchases by attorney from client.

There is no law that prohibits an attorney from purchasing property from his client during the continuance of the relation; but as the client may be unduly influenced by the

⁵⁷² Whipple v. Barton, 63 N. H. 613; Nesbit v. Lockman, 34 N. H. 167; Berrien v. McLane, Hoff. Ch. (N. Y.) 421; Planters' Bank v. Hornberger, 4 Cold. (Tenn.) 567; Harris v. Tremenhoe, 15 Ves. 302; Montesquieu v. Sandys, 18 Ves. 313; Hatch v. Hatch, 9 Ves. 302; Cassem v. Heustis, 201 Ill. 208, 94 Am. St. Rep. 160; Gray v. Ammons, 7 Mich. 533; Colgan v. Jones, 44 N. J. Eq. 274.

⁵⁷³ Lecatt v. Sallee, 3 Port. (Ala.) 115, 29 Am. Dec. 249; Berrien v. McLane, Hoff. Ch. (N. Y.) 421; Planters' Bank v. Hornberger, 4 Cold. (Tenn.) 567; Oldham v. Hand, 2 Ves. Sr. 259; Montesquieu v. Sandys, 18 Ves. 302; O'Brien v. Lewis, 9 Jur. (N. S.) 528, 8 Law Rep. 179.

⁵⁷⁴ Middleton v. Welles, 4 Brown Parl. Cas. 245.

⁵⁷⁵ Lecatt v. Sallee, 3 Port. (Ala.) 115, 29 Am. Dec. 249.

⁵⁷⁶ Marshall v. Dossett, 57 Ark. 93.

attorney, all such sales are looked upon by the law with a jealous eye, and the burden is on the attorney to prove that he used no undue influence in the purchase, and that it was made with absolute fairness. If he so proves, the purchase may be sustained, otherwise it will be set aside.⁵⁷⁷ Thus an attorney cannot purchase the subject-matter of litigation from his client, if, as a part of such transaction, he advises his client as to the probable outcome of the litigation and its effect upon the value of the property he is seeking to purchase.⁵⁷⁸ So an attorney cannot purchase property involved in litigation, or any property connected therewith, when he has obtained a special advantage over his client by reason of knowledge or information acquired from the latter, or in the conduct of the case, and if he does so his client may treat him as a trustee for his benefit, and compel him to account for all profits, or to convey to him the property, subject only to a lien for his services and expenditures.⁵⁷⁹ Thus, a purchase by an attorney, from his client or the latter's agent, of a judgment which he was employed to collect is presumptively

⁵⁷⁷ *Elmore v. Johnson*, 143 Ill. 513, 36 Am. St. Rep. 401; *Ross v. Payson*, 160 Ill. 349; *Willin v. Burdette*, 172 Ill. 117; *Mitchell v. Colby*, 95 Iowa, 202; *Yeamans v. James*, 27 Kan. 195; *Roman v. Mall*, 42 Md. 513; *Burnham v. Heselton*, 82 Me. 495, 20 Atl. 80, L. R. A. 90; *Dunn v. Record*, 63 Me. 17; *Howell v. Ransom*, 11 Paige (N. Y.) 538; *Carter v. West*, 93 Ky. 211; *Ah Foe v. Bennett*, 3 Or. 231.

⁵⁷⁸ *Rogers v. Marshall*, 3 McCrary, 76, 9 Fed. 721. And see *Cunningham v. Jones*, 37 Kan. 477, 1 Am. St. Rep. 257; *Brigham v. Newton*, 49 La. Ann. 1539.

⁵⁷⁹ *Hall v. Hallet*, 1 Cox Ch. 134; *Holman v. Loynes*, 4 De Gex M. & G. 270; *Marsh v. Whitmore*, 21 Wall. (U. S.) 178 (but if client acquiesced for twelve years it is too late to object); *Byers v. Surge*, 19 How. (U. S.) 303; *Sutliff v. Clunie* (Cal.) 37 Pac. 224; *Larey v. Baker*, 86 Ga. 468; *Crayton v. Spullock*, 87 Ga. 326; *McDowell v. Milroy*, 69 Ill. 498; *Sutherland v. Reeve*, 151 Ill. 384; *Hoss' Succession*, 42 La. Ann. 1022; *Cameron v. Lewis*, 56 Miss. 76; *Eoff v. Irvine*, 108 Mo. 378, 32 Am. St. Rep. 609; *Giddings v. Eastman*, Paige (N. Y.) 561; *Case v. Carroll*, 35 N. Y. 385; *Hatch v. Fogerty*, 40 How. Pr. (N. Y.) 492, 10 Abb. Pr. (N. S.) 147; *Gooch v. Peebles*, 105 N. C. 411; *Smith v. Brotherline*, 62 Pa. 461; *Galbraith v. Elder*, 8 Watts (Pa.) 81; *Hockenbury v. Carlisle*, 5 Watts & S. (Pa.) 348; *Cleavinger v. Reimar*, 3 Watts & S. (Pa.) 486; *Davis v. Smith*, 4 Vt. 269. And see ante, § 654.

is invalid, and the burden of proof is on him to show clearly that the transaction was fair and that an adequate consideration was paid therefor.⁵⁸⁰ It has been held that a purchase by an attorney from his client of the subject-matter of a suit pending litigation is absolutely void.⁵⁸¹ But when a client, during the pendency of his suit, conveys to the attorney part of the property in litigation as payment for his legal services, with full knowledge that the property conveyed is of greater value than such services, a delay for an unreasonable time before seeking to set the deed aside, during all of which time both parties treated the land as belonging to the attorney, is such laches on the part of the client as will bar his right of action.⁵⁸² So a purchase by an attorney from his client cannot be avoided after the client has deliberately ratified and confirmed it.⁵⁸³ But the client cannot be charged with delay, or with acquiescence, or concealment, unless there has been full knowledge on his part of all the facts, and perfect freedom of action. Acts which might appear to be acts of acquiescence are not deemed to be such if the client is ignorant of the circumstances, or under the control of the original influence, or otherwise so situated as not to be free to enforce his rights.⁵⁸⁴ But of course the above rules do not apply to a purchase made by an attorney, where the relation of attorney and client does not exist, although it may have existed before or after such purchase. Thus an attorney was entitled to recover profits made by the purchase of shares of stock from an administrator, though he had been employed by the administrator in specific matters affecting the estate, as he did not at the time of the purchase represent the estate for any purpose.⁵⁸⁵

⁵⁸⁰ *Stubbing v. Frey*, 116 Ga. 396.

⁵⁸¹ *West v. Raymond*, 21 Ind. 305.

⁵⁸² *Elmore v. Johnson*, 143 Ill. 513, 36 Am. St. Rep. 401. And see *Sh v. Whitmore*, 21 Wall. (U. S.) 178.

⁵⁸³ *Lewis v. Brown*, 36 W. Va. 1.

⁵⁸⁴ *Elmore v. Johnson*, 143 Ill. 513, 36 Am. St. Rep. 401.

⁵⁸⁵ *Beale v. Barnett's Adm'r*, 23 Ky. L. R. 1118, 64 S. W. 838. And see *post*, § 678.

§ 678. Relation must exist.

It is necessary, in order that the foregoing rules may apply, that the relation of attorney and client should exist between the parties. The mere fact that the opposite party to a transaction was an attorney at law is not sufficient. There must have been the attorney of the complaining party, at the time of the transaction. The facts that a party to a transaction is an attorney, and offers to and does draw the necessary writings gratuitously, do not establish the relation of attorney and client, nor raise the presumption of fraud or undue influence, until it is shown that the other is his client. And although the relation previously existed, yet if it has been terminated, the rule no longer applies.⁵⁸⁷ To avoid a contract then made, and otherwise unobjectionable, the client must show that it was procured by actual fraud.⁵⁸⁸ Nor does the rule apply where the relation of attorney and client does not exist, although the relation may subsequently be established between them.⁵⁸⁹

This rule applies to every person who represents, or, acting as confidential adviser, fills the place of an attorney for, the party for whom he is so acting and thereby acquires the influence which is usually exerted by an attorney over his client.⁵⁹⁰ And the fact that a person who assumed the character of a lawyer and fraudulently imposed upon a client that character was not in fact a lawyer does not release him from the duty that in his assumed character he voluntarily undertook, but he is bound to the utmost good faith and fair dealing towards his client.⁵⁹¹

VI. ATTORNEY'S DUTY AND LIABILITY TO THIRD PERSONS.

§ 679. In general—For breach of duty to client.

As in the case of all other agencies, the relation of attorney and client gives rise to certain duties which are due from

⁵⁸⁶ *Stout v. Smith*, 98 N. Y. 25, 50 Am. Rep. 632; *Tatom v. White*, 95 N. C. 453; *Beale v. Barnett's Adm'r*, 23 Ky. L. R. 1118, 64 S. 838.

⁵⁸⁷ *Tancre v. Reynolds*, 35 Minn. 476.

⁵⁸⁸ *Tancre v. Reynolds*, 35 Minn. 476.

⁵⁸⁹ *Davis v. Freethy*, 24 Q. B. Div. 519.

⁵⁹⁰ *Buffalow v. Buffalow*, 22 N. C. (2 D. & B. Eq.) 241.

⁵⁹¹ *Miller v. Whelan*, 158 Ill. 544.

attorney to third persons. It also gives rise, as we have seen, to certain duties to the client only. For a breach of duty by the attorney to a third person, the former the attorney will be liable to the third person injured thereby; but for a breach of duty due to the client exclusively he will not be liable to a third party for any injury sustained thereby. In such a case there is no privity of contract between the attorney and third person, and if, in the absence of fraud, the latter sustains an injury by reason of the attorney's breach of duty to his client, he has no right of action therefor against the attorney.⁵⁹² Thus where A, an attorney-at-law, employed and paid solely by B, to examine the title of the latter to a certain lot of ground, and gave over his signature this certificate, "B's title to the lot," "is good, and the property is unencumbered." C, with whom A had no contract or communication, relied upon this certificate as true, and loaned money to B, upon the latter pledging by way of security a deed of trust for the lot. B, before employing A, had transferred the lot in fee by a duly recorded conveyance, a fact which A, on examining the records, could have ascertained, had he exercised a reasonable degree of care. The money loaned was not paid and B was insolvent. It was held that there being neither fraud, collusion or falsehood by A, nor privity of contract between A and C, he was not liable to the latter for any loss sustained by reason of the certificate.⁵⁹³ Nor is the attorney liable to a third person for loss sustained, where he gave erroneous information to a casual inquiry by such third person, concerning the contents of a deed, and upon which the latter relied to his injury.⁵⁹⁴ Nor is he liable to a third party for mere negligence in the performance of some act for his client. Thus where an attorney acted with such negligence and ignorance in drafting and superintending the execution of a will that the intention of the testator failed, it was held that he was not liable to the person who, through his negligence and ignorance, was deprived of the interest in the tes-

⁵⁹² *National Sav. Bank of D. C. v. Ward*, 100 U. S. 195; *Dundee Bk. & Trust Inv. Co. v. Hughes*, 20 Fed. 39; *Fish v. Kelly*, 17 C. B. (N. S.) 194; *Houseman v. Girard Mut. B. & L. Ass'n*, 81 Pa. 256.

⁵⁹³ *National Sav. Bank of D. C. v. Ward*, 100 U. S. 195.

⁵⁹⁴ *Fish v. Kelly*, 17 C. B. (N. S.) 194.

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tator's estate which he would have received had the attorney properly performed his duties.⁵⁹⁵

§ 680. Where attorney contracts personally.

The above rule, however, applies only where the attorney contracts for his client; and in the absence of evidence to the contrary there is always a presumption that he intended to so contract, and that he intended to bind his client by such contract and not himself. Of course he may personally enter into a contract for himself, if he so desires, and where it is shown that he does so he will be personally liable for a breach thereof to a third person who was injured thereby, otherwise the presumption is that he acted for his client and he will not be liable.⁵⁹⁶

§ 681. Liability for fees.

Although, as a general rule, an attorney is not liable for acts or contracts made by him on behalf of his client, yet it is generally held that an attorney is personally liable to a sheriff or clerk of court or other officer, for services performed by them, at his request, in issuing, serving and filing writs or any other services performed during the progress of the case;⁵⁹⁷ or for a loss sustained in carrying out his directions.

⁵⁹⁵ Buckley v. Gray, 110 Cal. 339.

⁵⁹⁶ Wires v. Briggs, 5 Vt. 101, 26 Am. Dec. 284; Preston v. Panton, 1 Doug. (Mich.) 292.

⁵⁹⁷ Newton v. Chambers, 13 Law J. Q. B. 141 (customary to do so); Langridge v. Lynch, 34 Law T. (N. S.) 695; Foster v. Blacklock, 5 Barn. & C. 328; Heath v. Bates, 49 Conn. 342, 44 Am. Rep. 234; Tilton v. Wright, 74 Me. 214, 43 Am. Rep. 578; Tarbell v. Dinson, 3 Cush. (Mass.) 345; Towle v. Hatch, 43 N. H. 270; Campbell v. Cothran, 56 N. Y. 279; Adams v. Hopkins, 5 Johns. (N. Y.) 252; Ousterhout v. Day, 9 Johns. (N. Y.) 113; Trustees of Watertown v. Cowen, 5 Paige (N. Y.) 510, 27 Am. Dec. 80.

Park, C. J., in Heath v. Bates, 49 Conn. 342, 44 Am. Rep. 234, says: "In most cases of agency the principal is what the name imports—the leading person in the transaction. The agent is, as the term implies, a mere subordinate, important only as the representative of the principal; often representing only one principal. An attorney at law, on the other hand, occupies a position of recognized importance in itself, not infrequently of great prominence before the public, in which he often has a large number of clients."

in reference to the execution of a writ or other process. This rule is based upon the ground that by employing directing the officers to perform the various services

relations to whom are full of detail, and who are little noticed by the public. In these circumstances, if every officer who serves at the attorney's request, if every clerk of court who enters a writ for him upon the docket, is to look only to his clients as debtors, an inconvenience will be wrought that has no commensurate good to counterbalance it. It is true that an officer may refuse to serve a writ unless his fees are paid or secured, but this is practically of little advantage to him. A writ is sent by mail by an attorney of some other town or county. It requires immediate service. The officer desires to be prompt and faithful. It is putting upon him an unnecessary burden to require him to take the risk of losing his fees, or to await till he can hear from the plaintiff or his attorney at the risk of losing all opportunity to make service of the writ. It is perfectly easy for the attorney, if he does not wish to be personally responsible, so to instruct the officer when he gives him the writ. It is to be borne in mind that the attorney knows the plaintiff, while the officer knows nothing of him. It is generally the case that an attorney keeps a running account with certain officers who serve a large number of writs for him, and who would be put to great inconvenience if compelled to make their charges in each case to the plaintiff, especially when they have no knowledge that the attorney has received actual authority to bring the suit. The attorney already has his account with his client, knows what the fact is as to the authority to bring the suit, and could without inconvenience have required a prepayment of the expenses of instituting the suit, or ought to have done so. In every view of the case the rule is a reasonable one, and the only reasonable one, that an attorney placing a writ in an officer's hands for service is to be regarded as personally requesting the service and as personally liable therefor, unless he expressly informs him that he will not be personally liable, or there are circumstances which make it clear that this was the understanding of the parties. This is really no de-

If an attorney places a writ in the hands of an officer, with instructions to attach certain property with knowledge that the title to such property is in dispute, and after receiving from his client a sum of money to enforce his claim and to reimburse the officer for any loss he might sustain from the attachment, the attorney is to be regarded as personally requesting the service and personally liable to reimburse the officer if the levy turns out to be wrong. *Higgins v. Russo*, 72 Conn. 238, 77 Am. St. Rep. 307.

he impliedly contracts that he will pay them for such services or see that they are paid. He is the immediate employer of the officers and upon faith of his credit they perform services. In some jurisdictions it is specially provided by statute, or held by rules of practice, that an attorney is liable for all costs incurred on behalf of his client for fees of officers or witnesses,⁵⁹⁹ though in some cases the attorney

departures from the general law of agency. An agent can always bind himself personally where such is his intention. Here it is held to be a fair inference from the act of the attorney in placing the writ in an officer's hands and giving no notice to the contrary that he intends to be personally liable for his fees. And this inference undoubtedly accords with the actual fact in the great majority of cases. Indeed the exceptions are probably so few that they hardly to be entitled to consideration."

And in *Adams v. Hopkins*, 5 Johns. (N. Y.) 252, Thompson says: "I think, also, that the sheriff has a right to look to the attorney for this poundage. He is his immediate employer. The attorney cannot be considered as acting in the character of a known agent, so as to charge the sheriff with giving credit to the principal. The sheriff has no discretionary power left him, when he is to perform the service or not. He is bound to execute every legal process delivered to him, before he can demand his fees. * All reasonable security ought, therefore, to be extended to him to insure a compensation for his services. He cannot be presumed to be acquainted with the residence or responsibility of parties. * Different is the situation of the attorney. He is not bound to undertake any suit, nor incur any responsibility, without a reasonable indemnity, if suspicious of his employer." But in *Campbell v. Campbell*, 56 N. Y. 281, Andrews, J., says: "It may well be doubted whether the rule laid down in *Adams v. Hopkins* [5 Johns. 252] can be maintained upon principle, or is consistent with the general tenor of judicial authority elsewhere (*Judson v. Gray*, 11 N. Y. 408). But it has been for more than sixty years the law of this state. No practical injustice results from enforcing it, as attorneys act in view of the liability they incur in issuing executions and it ought not now to be disturbed."

⁵⁹⁹ *Booker v. Stinchfield*, 47 Me. 340; *Tilton v. Wright*, 74 Me. 214, 43 Am. Rep. 578; *Tarbell v. Dickinson*, 3 Cush. (Mass.) 326; *Towle v. Hatch*, 43 N. H. 270; New York Code Civ. Proc. §§ 3268; *Wright v. Black*, 2 Wend. (N. Y.) 258; *Jones v. Savage*, 2 Wend. 621; *People v. Marsh*, 3 Cow. (N. Y.) 334; *Renwick v. Central Coal Co.*, 55 N. Y. Super. Ct. 444; *Willmont v. Mese*

ity is limited to instances in which the client is a resident of the state or county in which the defendant resides.⁶⁰⁰ It has been held that when writs of mesne or process are committed to the sheriff or other officer for execution, by the attorney who sues them out, a promise by the attorney to pay the fees will be implied, unless disclosed; but if he does not so deliver them it is otherwise.⁶⁰¹ An attorney is held liable for the services of an accountant pursuant to an agreement with such attorney, where the fees were not rendered in a pending action, or to enforce a particular claim, but related to the ascertainment of the disposition of moneys advanced by a certain person to another, where the attorney did not disclose to the accountant the person whom he was acting.⁶⁰²

In suits in Pennsylvania, where the attorney is the plaintiff or the plaintiff in interest he is personally liable to the prothonotary for fees, as he is also for fees received by him from the attorney or client, due to the prothonotary.⁶⁰³ If the prothonotary has performed the services for which suit is brought, he is entitled to recover, although he has not in all respects literally complied with the letter of the law; the liability of the defendant for any damages sustained through neglect of the prothonotary is by action.⁶⁰⁴

As to while the presumed liability of the attorney is the rule in some cases, in others, in the absence of statute, it is wholly denied, and the attorney held not to be personally liable to sheriffs, sheriffs, or other officers for their fees for services rendered in behalf of his client during the progress of the cause, unless there is proof of his express promise to pay for them,

How v. Pr. (N. Y.) 430. In *How v. Codman*, 4 Me. 82, he is held liable by statute, by indorsing a writ for costs against his client, not for officer's fees on execution.

Carmichael v. Pendleton, Dud. (Ga.) 173; *Ross v. Harvey*, 32 Ga. 8; *Mackey v. Blake*, 15 Ga. 402; *Christmas v. Russell*, 2 Metc. 112; *Anon.*, 2 Gall. 101, Fed. Cas. No. 445; *Benson v. Whitcomb*, 101 (S. C.) 149; *Knowles v. Frawley*, 84 Wis. 119.

Cowle v. Hatch, 43 N. H. 270; *Tilton v. Wright*, 74 Me. 214, 1 L. Rep. 578.

Hood v. Rumsey, 50 App. Div. (N. Y.) 280.

Cone v. Donaldson, 47 Pa. 363.

Cone v. Donaldson, 47 Pa. 363.

or of some course of dealing or practice between him and such officer, from which such personal promise can be implied.⁶⁰⁵ "A lawyer by indorsing his name as an attorney

⁶⁰⁵ *Maybery v. Mansfield*, 9 Q. B. 754; *Royle v. Busby*, 6 Q. B. 171, 50 Law J. Q. B. 196; *How v. Codman*, 4 Me. 82; *Booker v. Stinchfield*, 47 Me. 340; *Maddox v. Cranch*, 4 Har. & McH. (Mass.) 343; *Preston v. Preston*, 1 Doug. (Mich.) 292; *Eastman v. C. Bank*, 1 N. H. 23; *Moore v. Porter*, 13 Serg. & R. (Pa.) 100; *W. v. Briggs*, 5 Vt. 101, 26 Am. Dec. 284. A solicitor for plaintiff in a partition suit is not liable to be attached for not paying to the commissioners his fees included in the taxed bill and collected from the defendants. *Lamoreux v. Morris*, 4 How. Pr. (N. Y.) 245.

"The law has imposed upon attorneys certain duties and liabilities, given them certain privileges and imposed certain disabilities. These, however, are said to be for the sake of the court and the suitors in it. * * * No principle of law has imposed upon the attorney an absolute liability to pay for services rendered or expenses incurred by third persons, for the client, in the progress of the cause. In conducting the suit, so far as third persons are concerned, the attorney is simply the agent of his client. The principle of law is well settled, that an agent does not become personally liable, unless his principal is unknown, or there is no response by the principal, or the agent exceeds his powers, or becomes liable by an undertaking in his own name. From the very nature of the business done by the clerk of the court in the progress of a suit, he has before him a knowledge of the principal for whom the attorney acts, and that the latter acts only in his capacity of an attorney. The statute fixes the amount to be paid to the clerk for the services required of him. He may refuse to perform any of the services until he receives his pay, or a personal promise by the attorney to pay him. If, however, the clerk performs the services without requiring immediate payment, or a personal undertaking by the attorney to pay him, the credit must be understood to be given to the client, and not to the attorney. * * * We do not intend to say that an attorney can in no case be made personally liable to the clerk for his fees, without proof of an express promise to pay them in each particular instance. If it should be shown that the clerk had uniformly refused credit to the client—that the attorney had been in the habit of paying such bills—that the clerk had repeatedly given him credit on his personal assumption—that there had, indeed, been any course of dealing between the parties which would warrant the inference that it was the mutual understanding between them that the credit should be given to the attorney, and not to his client, the attorney would be held per-

the back of a writ, which he delivers to an officer to serve, is not thereby make himself liable to such officer for his services. By the indorsement he makes it known to the officer, and to all other persons concerned, that he acts as agent or attorney of the plaintiff, who is principal and liable for fees. From the indorsement on the writ, the law does not imply a promise on the part of the lawyer that he will pay the officer his fees for service.⁶⁰⁶ Nor does a custom of the attorneys of a county to hold themselves responsible for sheriff's fees in cases in which they were employed, make the attorney responsible therefor unless there is proof that he expressly agreed to do so or that they were accustomed to pay such fees regardless of the client's responsibility.⁶⁰⁷

An attorney, however, is not impliedly liable for the fees of a stenographer in a case, although the services may have been rendered at the request of the attorney;⁶⁰⁸ nor of an official court reporter for services rendered in transcribing evidence to be used by the attorneys;⁶⁰⁹ nor for the fees of a referee, since a referee is not compelled to serve unless disposed to do so, the reason of the rule not applying to them;⁶¹⁰ nor for witnesses' fees, even where the witnesses were summoned in behalf of the attorney's client.⁶¹¹

liable. From such facts, his promise to pay might be fairly implied. We apprehend that it is upon the ground of the existence, in some of the states, of some general custom, practice or course of dealing, from which it may be inferred that the credit is given to the attorney, instead of his client, that the liability of the attorney is there understood to exist." *Preston v. Preston*, 1 Doug. (Mich.) 293.

⁶⁰⁶ *Wires v. Briggs*, 5 Vt. 101, 26 Am. Dec. 284. And see *How v. Man*, 4 Me. 82.

⁶⁰⁷ *Doughty v. Paige*, 48 Iowa, 483.

⁶⁰⁸ *Bonynge v. Field*, 44 N. Y. Super. Ct. 581, 81 N. Y. 159; *Sheriff v. Genet*, 12 Hun (N. Y.) 660; *Bonynge v. Waterbury*, 12 Hun (N. Y.) 534; *Thornton v. Tuttle*, 20 Abb. N. C. (N. Y.) 308; *Miller Palmer*, 25 Ind. App. 357, 81 Am. St. Rep. 107.

⁶⁰⁹ *Miller v. Palmer*, 25 Ind. App. 357, 81 Am. St. Rep. 107.

⁶¹⁰ *Judson v. Gray*, 11 N. Y. 408; *Howell v. Kinney*, 1 How. Pr. (N. Y.) 105; *Lamoreux v. Morris*, 4 How. Pr. (N. Y.) 245; *Gelb Copping*, 83 N. Y. 46; *Dinkel v. Wehle*, 63 How. Pr. (N. Y.) 298.

⁶¹¹ *Sargeant v. Pettibone*, 1 Alk. (Vt.) 355; *Robins v. Bridge*, 114; *Lee v. Everest*, 2 Hurl. & N. 285; *Mulligan v. Anon*, 25 Civ. Proc. R. (N. Y.) 348.

§ 682. Liability in tort—In general.

Although an attorney is not liable to a third person for breach of any duty owing to his client, yet there are certain duties due by him to such third person, for a breach of which he would be liable. For instance, it is his duty to so perform his services for his client as to commit no wrong and injure no one to another. If in the course of such services he commits a tort of some kind, and thereby injures a third person, he is as much liable for the consequential injury as if done by any other person. His profession does not shield him from his liability in such a case, and the fact that he is an attorney at law is no more of a protection from the consequences of his wrong-doing than if he were an agent of any other sort. Of course there may be circumstances in the case, as we shall presently see, that may lessen or relieve the attorney's liability in that case, as where he acts in good faith and is ignorant of any wrong-doing in the matter. But in the absence of any such circumstances, it is a general rule that an attorney is liable to a third party for any injury suffered by reason of the attorney's wrongful act or improper exercise of authority where he has been guilty of fraud, collusion, or of a malicious or tortious act.⁶¹²

Thus an attorney is liable to a third person in tort, where by his representations and promised indorsement, he induces such person to take an assignment of a debt placed in his hands for collection, by way of payment of a note against his client,⁶¹³ or where he conspires with an arbitrator to obtain an unjust award against the opposite party,⁶¹⁴ or where he conspires with his client or advises and directs him in the commission of an unlawful act.⁶¹⁵ If the attorney makes defamatory utterances, during the trial of his client's case

⁶¹² *Barker v. Braham*, 3 Wils. 368; *Crook v. Wright, Ryan & Co.*, 278; *Newberry v. Lee*, 3 Hill (N. Y.) 525; *Green v. Elgie*, 5 Q. B. 99; *Poole v. Houston & T. C. R. Co.*, 58 Tex. 134.

⁶¹³ In such a case the attorney is personally responsible to the assignee for the collection of the debt. *Hazelrigg v. Brenton*, 2 Duv. (Ky.) 525.

⁶¹⁴ *Hoosac Tunnel Dock & E. Co. v. O'Brien*, 137 Mass. 424, 17 Am. Rep. 323.

⁶¹⁵ *Goodenough v. Spencer*, 46 How. Pr. (N. Y.) 347.

one is responsible therefor, and not the client.⁶¹⁶ The fact, however, that an attorney has drawn up the papers in a transaction, which results in a fraud to a third person, does not make him liable therefor, unless there is further showing him to be a party to the fraud.⁶¹⁷

Where attorney acts in good faith.

It is necessary, however, in order to hold the attorney responsible for a wrong done by him in the course of his employment, that there should have been an intention, expressly implied, on his part to do the wrong complained of. He is not liable to a third person for injuries suffered by another by reason of the attorney's acts, where he acts in good faith for his client, performing only his professional duties and is not cognizant of the fact that the client had begun to act with a tortious intent.⁶¹⁸ He is not liable where he merely acts according to the instructions of his client, as when he institutes and conducts a judicial proceeding, or procures the issuance of process at his instance.⁶¹⁹ Thus, an attorney, acting under the instructions of his client, in effecting the seizure of certain property under attachment, is not bound to inquire, or to have any belief or suspicion, as to the ownership of the property, and he will not be held liable to the owner of the property, if it does not belong to the attachment defendant.⁶²⁰

An attorney is liable to an officer who takes an attachment bond executed by him for several plaintiffs, where the bond proves invalid, because of his want of authority to

Monroe v. Weston Lumber Co., 50 La. Ann. 142.

Barnes v. Addy, 9 Ch. App. 244, 43 Law J. Ch. 513.

Stockley v. Hornidge, 8 Car. & P. 16, 34 E. C. L. 580; *Campbell v. Brown*, 2 Woods, 349, Fed. Cas. No. 2,355; *Burnap v. Marsh*, 535; *Lyon v. Tevis*, 8 Iowa, 79; *Peck v. Chouteau*, 91 Mo. App. 236; *Schalk v. Kingsley*, 42 N. J. Law, 32; *Lynch v. Sullivan*, 16 Serg. & R. (Pa.) 368, 16 Am. Dec. 582; *Wigg v. Simon*, 2 Rich. Law (S. C.) 583.

Ford v. Williams, 13 N. Y. 584, 67 Am. Dec. 83; *Dawson v. Brown*, 70 Iowa, 127; *Farmer v. Crosby*, 43 Minn. 459; *Hunt v. Brown*, 28 Ga. 297; *Campbell v. Brown*, 2 Woods, 349, Fed. Cas. No.

Dawson v. Buford, 70 Iowa, 127.

execute it for the plaintiffs.⁶²¹ Though he is not liable to the bondsmen where he writes out a replevy instead of a forthcoming bond, which had been agreed between the sheriff and sureties should be written in order to release certain property; a replevy bond being the only one which the sheriff could legally receive, and there being no proof of fraud or collusion on the part of the attorney.⁶²²

— **Where he does not act in good faith.** But if the attorney knows that his client is actuated by malice, and he permits himself to be made the instrument of committing some wrong against a party, he is morally and legally just as much liable as if he were prompted by his own malice against the injured party. "If he will knowingly sell himself to execute out the malicious purposes of another, he is partaker of the malice as much as if it originated in his own bosom." He is liable where, without authority from his client, he institutes proceedings against a third party, for some improper or malicious motive of his own, or where he colludes with his client to do an illegal act, or where he in any manner causes an injury to another for his own personal malice.⁶²⁴ When an attorney, having in his possession moneys of his client, after notice of his client's assignment thereof to a third person, pays them to his client, he is liable to the assignee.⁶²⁵

§ 684. Liability of attorney for trespass.

It is a well settled rule, in the case of trespass, that all parties who in any way participate therein, are liable to the party injured for the loss he sustains. Thus where an attorney gives to an officer a writ, he either expressly or impliedly commands the officer to take the usual steps in serving it; and if the writ is void or shows its irregularity on its face the officer is a trespasser, and the attorney is liable

⁶²¹ *Jones v. Wolcott*, 2 Allen (Mass.) 251.

⁶²² *Brand v. Craig*, 84 Ga. 12.

⁶²³ *Burnap v. Marsh*, 13 Ill. 535.

⁶²⁴ *Farmer v. Crosby*, 43 Minn. 459; *Bicknell v. Dorton*, 16 (Mass.) 478; *Anon.*, 1 Mod. 209; *Schalk v. Kingsley*, 42 N. J. 32; *Wigg v. Simonton*, 12 Rich. Law (S. C.) 583.

⁶²⁵ *Gayle v. Benson*, 3 Ala. 234.

because he participates in the trespass.⁶²⁶ So where plaintiff in an attachment suit, and his attorney, directed service of the writ, and after service thereof refused to consent to the release of the property attached when required by the owner, an action of trespass will lie against them in favor of the owner of the property levied upon, who was the defendant in such attachment suit, even though they were not present when such attachment was served, and did not in person interfere with the property.⁶²⁷ So where an attorney illegally issues execution against property, when he knows or has reason to know that it is illegal, he is liable for consequent damages.⁶²⁸

But, as has been seen heretofore, in order for the attorney to be liable he must share in the tortious intent. He is not liable, himself, as a trespasser if he does not share in such intent, as where he merely communicates to a sheriff or other officer the instructions given by the client; or if the client himself delivered the writ to the officer, and gave directions for its service.⁶²⁹ An attorney is not liable jointly with his client, or separately, where he acts in the strict line of his duty, and goes no further.⁶³⁰ In general, all who aid or abet the commission of a trespass are liable jointly or severally at the election of the party entitled to the action. But where one acts only in execution of the duties of his calling or profession, and does not

Burnap v. Marsh, 13 Ill. 535; *Cook v. Hopper*, 23 Mich. 511. See *Ross v. Griffin*, 53 Mich. 5; *Green v. Elgie*, 5 Q. B. 99, 48 L. J. 99, *Dav. & M.* 199; *Peckinbaugh v. Quillin*, 12 Neb. 586. Not where the writ or warrant is sufficiently regular on its face to protect the officer executing it. *Wheaton v. Whittemore*, 13 Mich. 348.

Cook v. Hopper, 23 Mich. 511.

Rowles v. Senior, 8 Q. B. 677; *Codrington v. Lloyd*, 8 Adol. & 49; *Crozer v. Pilling*, 6 Dowl. & R. 129, 4 Barn. & C. 26; *Bates v. Pilling*, 9 Dowl. & R. 44, 6 Barn. & C. 38.

Ford v. Williams, 13 N. Y. 577, 67 Am. Dec. 83; *Hunt v. Printz*, 28 Ga. 297; *Dawson v. Buford*, 70 Iowa, 127; *Rice v. Melendy*, 70 Iowa, 396; *Cook v. Hopper*, 23 Mich. 511; *Farmer v. Crosby*, 43 N. Y. 459; *Schalk v. Kingsley*, 42 N. J. Law, 33; *Baker v. Secor*, 1 Y. Supp. 303; *Wigg v. Simonton*, 12 Rich. Law (S. C.) 583.

Sedley v. Sutherland, 3 Esp. 202.

go beyond it, and does not actually participate in the trespass, he is not liable though what he does may aid another party in its commission."⁶³¹ Where an attorney delivers writ to the sheriff, and does not exceed his authority in any way, he does not participate in the trespass if the writ is legal and is not liable if the officer exceeds the command impliedly given by the writ, as if he levies upon the goods of a wrong person, or seizes property not liable to execution or makes an excessive levy,⁶³² unless he directs or assents to the acts which constitute the trespass, or in some way participates therein.⁶³³

And if the attorney was in the employ of another, with whom he and the officer were acting, the employer or principal is also liable; he being a participant in the trespass. His liability is based on the ground that he is liable for the acts of the attorney committed by him within the scope of his authority; and although he may not have expressly directed the attorney to sue out the writ, yet he impliedly gave him the authority to do so, and consequently is as much liable for the trespass as any other participant. And so where the plaintiff's property was taken and sold under an execution wrongfully issued at the instance of the defendant's attorney i. e. after an appeal had been perfected, the defendant was held liable in trespass.⁶³⁵ But the fact that the attorney directed or advised the wrongful acts committed by the officer, does not make the client liable for the tortious acts in the absence of proof that he authorized or otherwise participated therein.

⁶³¹ Ford v. Williams, 13 N. Y. 584, 67 Am. Dec. 83; Id., 24 N. Y. 584.

⁶³² Ford v. Williams, 13 N. Y. 577, 67 Am. Dec. 83; Cook v. Hopper, 23 Mich. 511; Seaton v. Cordray, Wright (Ohio) 102; Averill v. Williams, 4 Denio (N. Y.) 295, 47 Am. Dec. 252; Id., 1 Denio (N. Y.) 501; Adams v. Freeman, 9 Johns. (N. Y.) 118; Hardy v. Keeler, 56 Ill. 152.

⁶³³ Hardy v. Keeler, 56 Ill. 152; Cook v. Hopper, 23 Mich. 511; Peckinbaugh v. Quillin, 12 Neb. 586; Schalk v. Kingsley, 42 N. Y. Law, 33; Arnold v. Phillips, 59 Ill. App. 213.

⁶³⁴ Foster v. Wiley, 27 Mich. 244, 15 Am. Rep. 185; Newberry v. Lee, 3 Hill (N. Y.) 525; Barker v. Braham, 3 Wils. 368; Bates v. Pilling, 6 Barn. & C. 38; Crook v. Wright, Ryan & M. 278, 21 E. C. L. 751; Foster v. Pitts, 63 Ark. 387.

⁶³⁵ Foster v. Wiley, 27 Mich. 244, 15 Am. Rep. 185.

ated in such acts.⁶³⁶ Thus, in the absence of proof of
 ial authority to an attorney, his acts in directing the
 upon or taking of goods upon process are in excess of his
 ral powers as an attorney and do not affect or subject his
 at to liability.⁶³⁷

5. Liability for false imprisonment.

n attorney is liable for false imprisonment where he pro-
 s the arrest and imprisonment of a person under an ille-
 process, or without cause.⁶³⁸ Thus where an attorney
 sed a single justice to send to jail one who was brought
 re him on a charge of felony, whereas such power was
 ed by the statute only in two justices acting together, it
 held that the attorney was liable in damages to the ag-
 ved party.⁶³⁹ So an attorney is liable to one who has
 arrested on a ca. sa., issued by the attorney on a judg-
 t which has been discharged under the provisions of an
 vent act;⁶⁴⁰ or where he sues out and directs the execu-
 of process upon which a party is arrested, for a mali-
 s and illegal purpose.⁶⁴¹

6. Liability for malicious prosecution.

ikewise an attorney may render himself liable to a third
 y by participating in a malicious prosecution of such

Welsh v. Cochran, 63 N. Y. 181, 20 Am. Rep. 519; Averill v.
 lams, 4 Denio (N. Y.) 295, 47 Am. Dec. 252; Freeman v. Rosher,
 B. 780; Kirksey v. Jones, 7 Ala. 622; Pollock v. Gantt, 69 Ala.

Averill v. Williams, 4 Denio (N. Y.) 295, 47 Am. Dec. 252.
 Burnap v. Marsh, 13 Ill. 535; Codrington v. Lloyd, 8 Adol. & E.
 35 E. C. L. 676; Barker v. Braham, 3 Wils. 368; Sleight v.
 enworth, 5 Duer (N. Y.) 122; Moore v. Cohen, 128 N. C. 345.
 re a defendant, on being taken in execution on a ca. sa., tendered
 amount of the debt and costs to the plaintiff's attorney, and
 ested him to sign his discharge, which the latter refused to do
 he should be paid an independent collateral demand for the
 , the plaintiff and his attorney were held liable for such refusal
 the consequent imprisonment. Crozer v. Pilling, 6 Dowl. & R.
 4 Barn. & C. 26.

Revill v. Pettit, 3 Metc. (Ky.) 314.

Deyo v. Van Valkenburgh, 5 Hill (N. Y.) 242.

Warfield v. Campbell, 35 Ala. 349; Green v. Elgie, 5 Q. B. 99.

party. In case of a malicious prosecution, it must not appear that the attorney knew that the prosecution was malicious, in order to render him liable therefor, but it must also appear that he knew it was without cause.⁶⁴² In an action against an attorney for a malicious arrest, the jury must be satisfied of the absence of any just demand on the part of his client, and also that the attorney knew that there was not any such demand; and applying the law for some purpose of his own, or for some other ill purpose which the law calls malicious, committed the injury complained of to the plaintiff. In such a case it is not necessary to prove malice in the ordinary sense of the word; any improper or sinister motive will be sufficient.⁶⁴³ Thus, where an attorney willfully and maliciously institutes and carries on a malicious prosecution against a third person, in order to work some personal malice or vengeance against the party, he is liable to the party for any injury sustained therefrom, although the attorney was ostensibly acting for his client.

It is essential, however, that the attorney should have shared in his client's malicious intent, or that he should have had such an intent of his own, express or implied. When he institutes the prosecution upon the statements of his client and without any knowledge of his own that it is without cause, he will not be liable.⁶⁴⁵ "The attorney has a right to advise and act upon such information as he gets from his client. Nothing short of complete knowledge on the part of the attorney that the action is groundless and that the client is acting solely through illegal or malicious motives should make him liable in these actions. As said by Mr. Justice Bradley,⁶⁴⁶ 'If attorneys cannot act and advise freely without constant fear of being harassed by suits and acts

⁶⁴² *Peck v. Chouteau*, 91 Mo. 140, 60 Am. Rep. 236; *Burnap v. Marsh*, 13 Ill. 535; *Hunt v. Printup*, 28 Ga. 297.

⁶⁴³ *Stockley v. Hornidge*, 8 Car. & P. 11.

⁶⁴⁴ *Stockley v. Hornidge*, 8 Car. & P. 16; *Burnap v. Marsh*, 13 Ill. 535; *Wood v. Weir*, 5 B. Mon. (Ky.) 544; *Warfield v. Campbell*, Ala. 349.

⁶⁴⁵ *Peck v. Chouteau*, 91 Mo. 151, 60 Am. Rep. 236; *Stockley v. Hornidge*, 8 Car. & P. 11; *Bicknell v. Dorion*, 16 Pick. (Mass.)

⁶⁴⁶ *Campbell v. Brown*, 2 Woods, 350, Fed. Cas. No. 2,355.

y, parties could not obtain their legal rights.'"⁶⁴⁷ If an attorney employed to bring a suit against a certain party, by mistake brings it against another party of the same name obtains judgment and execution against him, or, having the right defendant, issues execution by mistake against a party having the same name as the defendant, he is not liable in trespass, the wrong being purely an unintentional and not malicious.⁶⁴⁸ So an action for malicious prosecution will not lie against one attorney for suing another in a superior court, or for suing on the retainer of a client, although he knew there was no cause of action.⁶⁴⁹

Liability for money improperly collected.

It is a general rule of agency that the principal alone is liable for money paid to his agent, which the payor has a right to recall but does not until after it has been paid by the agent to his principal, and this rule is applicable to attorneys.⁶⁵⁰ If, however, the attorney receives the money out of his agency and through his own wrong, he himself is liable for the amount so received, even though he may have turned it over to his client.⁶⁵¹ Thus a plaintiff's attorney is liable to the defendant, not to his client, for an excess in the amount of an execution made to him.⁶⁵² So where an attorney receives payment of costs not due on the case, he is liable to refund the costs so collected by him, although some time had elapsed since the payment of them to him, and although the payment was voluntarily made.⁶⁵³ The rule that money paid under a mistake of law could not be recovered is inapplicable as between an attorney and his client, but applicable between an attorney and the opposite party, where the money is paid for professional services under a regulation of the bar.⁶⁵⁴

Peck v. Chouteau, 91 Mo. 151, 60 Am. Rep. 236.

Davies v. Jenkins, 11 Mees. & W. 745.

anon., 1 Mod. 209.

Wilmerdings v. Fowler, 55 N. Y. 641.

Metcalf v. Denson, 4 Baxt. (Tenn.) 565; *Fowler v. Shearer*, 10 Baxt. 23.

Groft v. Hicks, 26 Tex. 383.

Moulton v. Bennett, 18 Wend. (N. Y.) 587.

Moulton v. Bennett, 18 Wend. (N. Y.) 587.

§ 688. Liability for misconduct or negligence.

Where an attorney in a suit has been guilty of violating the rules of decency and decorum, the court may punish him by taxing him with the costs of the suit, and generally with damages, so, where his conduct has not been such as to merit disbarment or imprisonment for contempt.⁶⁵⁵ Thus where an attorney puts in the pleadings impertinent or scandalous matter he may be made liable to the opposite party for costs incurred by the latter in throwing out such matter.⁶⁵⁶ "It is the settled law of the court, that the solicitor who drafts a scandalous or impertinent pleading or proceeding, and the counsel who sanctions it with his name, are both personally liable to the adverse party for the costs of expunging such scandalous or impertinent matter. And, as a general rule, also, such costs should be charged upon them instead of the client, in the first instance, although the client is also liable therefor."⁶⁵⁷ And it is no excuse that the attorney signed the impertinent pleading as a friend, without reward, without reading the pleading. He is still liable for the costs.⁶⁵⁸ If the attorney is ignorant or careless, by reason of which errors are committed by him, he may be held personally liable for all costs which result therefrom.⁶⁵⁹ Where a wrongful order is made by the court, upon a statement of untruth of which the attorney ought by reasonable diligence to have known, he is liable to indemnify all who suffer from the making of such order, even though he makes or adopts the statement in good faith.⁶⁶⁰ These rules apply the

⁶⁵⁵ *Brown v. Brown*, 4 Ind. 627, 58 Am. Dec. 641; *Loveland v. J. J. Brown*, 4 Ind. 184.

⁶⁵⁶ *Powell v. Kane*, 5 Paige (N. Y.) 265, 2 Edw. Ch. (N. Y.) 265; *McVey v. Cantrell*, 8 Hun (N. Y.) 522.

⁶⁵⁷ *Powell v. Kane*, 5 Paige (N. Y.) 266.

⁶⁵⁸ *Cushman v. Brown*, 6 Paige (N. Y.) 539.

⁶⁵⁹ *Kane v. Van Vranken*, 5 Paige (N. Y.) 62; *Ex parte Robinson*, 63 N. C. 309; *Respass v. Morton*, Hard. (Ky.) 234; *Jordan v. National Shoe & Leather Bank*, 45 N. Y. Super. Ct. 423; *Anon.*, 11 Ill. 423; *American Ins. Co. v. Oakley*, 9 Paige (N. Y.) 496, 38 Am. Dec. 641; *Bauer v. Betz*, 99 N. Y. 672; *Sharp v. Fields*, 5 Lea (Tenn.) 321.

⁶⁶⁰ *In re Spencer*, 39 Law J. Ch. 841.

re the attorney is himself the party litigant, as where he acting for another.⁶⁶¹

VII. CLIENT'S LIABILITY TO ATTORNEY.

9. For reimbursement and indemnity.

has been seen in a former chapter that a principal is liable to his agent for any advances made or expenses incurred by him while acting within the course of his employment for the principal's benefit. This principle likewise applies to the relation of attorney and client; and the client is bound to reimburse his attorney for any costs or expenses which the latter has, in good faith, incurred while acting in the scope of his authority for the client's benefit, and contrary to special instructions given to him by his client, or caused by the attorney's negligence or misconduct.⁶⁶² Thus, where an attorney at law, who is employed to collect a debt, in good faith and with prudence and discretion indemnifies an officer in making a levy, by virtue of his implied authority so to do, and suffers damage thereby, he is bound to be reimbursed by his client.⁶⁶³ But if the attorney acts without authority from his client he cannot claim indemnification, although he has acted on a supposed author-
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10. For compensation—In general.

When an attorney enters into the employment of a client, he may make an express agreement with such client concerning his compensation, as that he will charge for his services in case he is successful in the cause, or that he will perform his services gratuitously, or that his compensation will depend upon some contingency; or he may enter into any other lawful and bona fide agreement in regard to his com-

In re Kelly, 62 N. Y. 198.

Clark v. Randall, 9 Wis. 135, 76 Am. Dec. 252; Campion v. King, 100 N. Y. 35; Seevers v. Hamilton, 6 Iowa, 199; Haseltine v. Mahan, 100 N. Y. 55, 55 Pac. 467; Sibley v. Rice, 58 Neb. 785; Kult v. Nelson, 100 N. Y. 238; Badger v. Celler, 41 App. Div. (N. Y.) 599.

Clark v. Randall, 9 Wis. 135, 76 Am. Dec. 252.

Gray v. Emmons, 7 Mich. 533.

C. & S.—95.

pensation, and where such is made the client's liability compensation will be regulated thereby. But in the absence of such an agreement, or other circumstances to the contrary, there is always a presumption, where an attorney engages to perform services for another, that he did not intend to perform such services gratuitously, and that there is an implied agreement by the client to pay a fair compensation for such services, which agreement may be enforced by the attorney;⁶⁶⁵ and if the client denies this presumption or implied agreement the burden of proof is on him to show otherwise.⁶⁶⁶ But where the attorney has a personal interest in the result, or if his services are rendered in such a way as to authorize the inference that he did not intend to charge for them, it is held that his services will, in the absence of an agreement otherwise, be presumed to be rendered gratuitously.⁶⁶⁷ The mere fact that services are rendered does not raise a liability on the part of the person for whom they are rendered to pay for them, even though done at his request, if the circumstances are such as to rebut the inference that compensation is to be made.⁶⁶⁸

An attorney at law has a right to be paid for professional services rendered another attorney; and where there is no express contract, the law will imply one. The fact that attorneys sometimes from courtesy render services gratuitously to their brother attorneys does not affect this legal right.

⁶⁶⁵ *McBratney v. Chandler*, 22 Kan. 692, 31 Am. Rep. 213; *Hughes v. Oakes*, 1 Cush. (Mass.) 296; *Moran v. L'Etourneau*, 118 Mich. 103; *Webb v. Browning*, 14 Mo. 354; *Taussig v. St. Louis & K. R. Co.*, 28, 89 Am. St. Rep. 674; *Smith v. Davis*, 45 N. H. 566; *Crosby v. Kropf*, 33 App. Div. (N. Y.) 446; *Gillette v. Murphy*, 7 Okl. 100; *Vilas v. Downer*, 21 Vt. 419.

⁶⁶⁶ *Brady v. City of New York*, 1 Sandf. (N. Y.) 569.

⁶⁶⁷ *Peterboro v. Burnham*, 12 U. C. (C. P.) 103; *Vanduzer v. Millan*, 37 Ga. 299; *Lilly v. Pryse*, 21 Ky. L. R. 1223, 54 S. W. 200; *Humphreys v. Jacoby*, 41 Minn. 226; *Martin v. Campbell*, 11 N. H. 566; *Eq. (S. C.)* 205.

⁶⁶⁸ *Cicotte v. Catholic, Apostolic & R. Church*, 60 Mich. 552; *Field v. Chenoweth* (Ind. App.) 56 N. E. 51.

⁶⁶⁹ "While there does exist in certain localities at least a 'custom' among gentlemen of the bar not to charge each other, but to render services requested by a brother lawyer to render him services in the

mayor of a city, who is a lawyer by profession, may recover for legal services rendered to the city without collusion and fraud.⁶⁷⁰

Requisites of attorney's right to compensation.

Employment.—In order that an attorney may recover compensation from his client for professional services, it is necessary that he should show a contract of employment, express or implied, between him and his client.⁶⁷¹ And the same is the same although the real beneficiary in the case is the nominal party at whose request the services were ren-

dered in their profession without fee or reward, yet where such 'courtesy' is shown it does not touch the legal rights of the parties. The very fact that it is called a courtesy indicates that making no charge is exceptional, and that the general rule is to charge. Besides, even where such courtesy is generally practiced, we have no doubt that there are certain well-grounded exceptions to the rule, and at the moment the parties, from any cause whatever, stand upon their legal rights, there can be no such thing as courtesy in the case." *Conroy v. Stokes*, 24 S. C. 483.

City of Niles v. Muzzy, 33 Mich. 61, 20 Am. Rep. 670.

Humes v. Decatur Land Imp. & F. Co., 98 Ala. 471; *Graves v. Wood*, 30 Conn. 276; *Evans v. Mohr*, 153 Ill. 561; *Price v. Hay*, 111 Ill. 543; *Hersleb v. Moss*, 28 Ind. 354; *Cleveland, C., C. & St. Co. v. Shrum*, 24 Ind. App. 96; *Blakey v. New York L. Ins. Co.*, 111 Ind. App. 428; *Turner v. Myers*, 23 Iowa, 391; *Wailles v. Brown's Commission*, 27 La. Ann. 411; *Roselius v. Delachaise*, 5 La. Ann. 481, 25 La. Dec. 597; *Wright v. Fairbrother*, 81 Me. 38; *Prentiss v. Kelley*, 111 Me. 436; *Neighbors v. Maulsby*, 41 Md. 478; *Perry v. Lord*, 111 Minn. 504; *Fraser v. Haggerty*, 86 Mich. 521; *White v. Esch*, 78 Minn. 504; *Stewart v. Emerson*, 70 Mo. App. 482; *Mitchell v. Bromberger*, 111 Mo. 604; *Burghart v. Gardner*, 3 Barb. (N. Y.) 64; *Hotchkiss v. Wyck*, 9 Johns. (N. Y.) 142; *Richards v. Washburn*, 14 App. Div. (N. Y.) 237; *Whitesell v. New Jersey & H. R. R. & F. Co.*, 68 App. Div. (N. Y.) 82; *Cincinnati, S. & C. R. Co. v. Lee*, 37 Ohio St. 479; *Woods v. Woods*, 76 Pa. 408; *Playford v. Hutchinson*, 135 Pa. 426; *Conroy v. Stewart*, 13 S. C. 445; *Ex parte Fort*, 36 S. C. 25; *Johnston v. Williams*, 96 Tenn. 339; *Tindol v. Beasley* (Tex. Civ. App.) 150; *W. 155*; *Smith v. Dougherty*, 37 Vt. 530; *Hooker v. Village of Union*, 75 Wis. 8. If the attorney is employed by an administrator, in order that he may retain his commission out of moneys of the estate collected, he must show that the probate court sanctioned or authorized such employment. *Turner v. Tapscott*, 30 Ark.

dered.⁶⁷² Where an attorney appears on record for a son, it is prima facie evidence that such person is liable to the attorney for his fees, but it may be shown that such attorney was in fact in the employment of some other person.⁶⁷³

It is not necessary that such employment should be by express contract or that there should have been any request by the client for the attorney to act, but it may be inferred from circumstances, as from the acts or conduct of the client.⁶⁷⁴ Thus where the original employment is not proved, employment may be shown by establishing acts of recognition of the attorney by the client, during the progress of the cause;⁶⁷⁵ or by his knowingly accepting the benefits of the services.⁶⁷⁶ But the mere fact that the attorney's services have been beneficial to a person will not be sufficient to render such person liable therefor, if there has been no employment, express or implied.⁶⁷⁷ Thus, where an attorney is

⁶⁷² *Bell v. Smith*, 28 Ill. App. 181; *Simon v. Sheridan*, 21 N. Y. 489.

⁶⁷³ *Rosellius v. Delachaise*, 5 La. Ann. 481.

⁶⁷⁴ *Hood v. Ware*, 34 Ga. 328; *Cooper v. Hamilton*, 52 Ill. 1; *Town of New Athens v. Thomas*, 82 Ill. 259; *Miles v. Deane*, 8 Ind. App. 176; *Turner v. Myers*, 23 Iowa, 391; *Hudspeth v. State*, 78 Iowa, 11; *Pittsburgh, C. & St. L. R. Co. v. Woolley*, 12 Bush 451; *Neighbors v. State*, 41 Md. 478; *Boyd v. Chicago & A. R. R.*, 84 Mo. 615; *Brennan-Love Co. v. McIntosh*, 62 Neb. 522; *Gooden v. Bedel*, 20 N. H. 205; *Burghart v. Gardner*, 3 Barb. (N. Y.) 1; *Wright v. Smith*, 13 Barb. (N. Y.) 414; *Parshley v. Third Church*, 147 N. Y. 583; *Ames v. Potter*, 7 R. I. 265; *Hill v. Church*, 10 Yerg. (Tenn.) 514; *Callender v. Turpin* (Tenn. Ch. App.) 1; *W. 1057*; *International & G. N. R. Co. v. Clark*, 81 Tex. 48; *Ellis v. Wiggins*, 30 Tex. 55; *Isham v. Parker*, 3 Wash. St. 755; *Felt v. Haight*, 33 Wis. 259.

⁶⁷⁵ *Hotchkiss v. Le Roy*, 9 Johns. (N. Y.) 142. But the fact that he is recognized as counsel for his client by the attorney for the opposite party does not establish the relation or his right to compensation. *Hotchkiss v. Le Roy*, *supra*.

⁶⁷⁶ *Savings Bank of Cincinnati v. Benton*, 2 Metc. (Ky.) 240.

⁶⁷⁷ *Milligan v. Ala. Fertilizer Co.*, 89 Ala. 322; *Seeley v. No. Conn.* 92; *Chicago, St. C. & M. R. Co. v. Larned*, 26 Ill. 218; *Ellis v. Moss*, 28 Ind. 354; *Muscott v. Stubbs*, 24 Kan. 520; *Ward v. Brown*, 27 La. Ann. 411; *Cooley v. Cecile*, 8 La. Ann. 51; *Grady*

by one party, other parties do not become liable to fees, by reason of the fact that they are also equally interested in the cause and stand by, without objection, and for the benefit of his services which extends to all parties interested.⁶⁷⁸ Nor is a promise to pay for services raised by a party tacitly accepting them, where he had distinctly refused to pay for such services before they were rendered by an attorney.⁶⁷⁹ So, where the maker of a note employs an attorney to defend himself and two sureties thereon, such employment, in the absence of proof of their consent or ratification, does not make the sureties liable for the attorney's

fees. There seems, however, to be some exceptions to the above rule where the persons for whom the attorney acts are not competent to contract; "as where the parties for whom the services are rendered are infants, lunatics, or from any other cause are incapable of contracting, or where the parties are numerous and have an interest in common, for the benefit of which professional services are rendered at the instance of one or more of the parties interested."⁶⁸¹ In some jurisdictions, however, it is held that an attorney must look to his employer for his compensation, and that when a trustee, legatee, or guardian employs an attorney in the execution of his trust, the attorney must look to the person employing him individually for his payment, and can have no claim on the trust

estate. *White v. Esch*, 44 Mich. 383; *White v. Esch*, 78 Minn. 264; *Westmoreland v. White*, 24 S. C. 238.

Simball v. Cruse, 70 Ala. 534; *Simms v. Floyd*, 65 Ga. 719; *St. C. & M. R. Co. v. Larned*, 26 Ill. 220; *Savings Bank of St. Louis v. Benton*, 2 Metc. (Ky.) 240; *Ealer v. McAllister*, 19 La. 410; *Smith v. Lyford*, 24 Me. 147; *Jones v. Woods*, 76 Pa. 410. *McCrary v. Ruddick*, 33 Iowa, 521; *Holmes v. Holland*, 29 Cin. Law Bul. 115.

Hughes v. Dundee Mortg. & Trust Inv. Co., 21 Fed. 174; *Fraser v. Yergert*, 86 Mich. 521. Compare *Yerger v. Aiken*, 7 Baxt. 539.

Smith v. Lyford, 24 Me. 147; *Simms v. Floyd*, 65 Ga. 719.

Simmons v. Stewart, 13 S. C. 445. In the absence of proof to the contrary, an attorney appearing for an infant plaintiff will be presumed to have been employed by the plaintiff's guardian or next friend. *Hilliard v. Carr*, 6 Ala. 557.

fund.⁶⁸² But in other jurisdictions the attorney's fees imposed upon the fund benefited, or realized, by his services.⁶⁸³

Where the attorney has been employed by an agent of client, it must be shown that the agent had authority, express or implied, from the client to make such employment in order to make the client liable for the attorney's compensation.⁶⁸⁴

(b) Performance.—And not only must the attorney show a contract, express or implied, of employment, in order to recover for his services, but he must also show that he has performed his services, at least in part, under such contract, or show that they have been waived. Generally he must demand a retainer fee before he has performed any service, but as to other fees he has no right to make a demand or bring an action therefor, until he has performed his services under the contract, unless there is a special contract providing otherwise.⁶⁸⁵ But an attorney is not entitled to co-

⁶⁸² *Bowman v. Tallman*, 27 How. Pr. (N. Y.) 212; *Noyes v. Blauvelt*, 6 N. Y. 580; *Scott v. Dalley*, 89 Ind. 477.

⁶⁸³ *Trustees v. Greenough*, 105 U. S. 527; *Central R. & B. Co. v. E. R. Co.*, 113 U. S. 116; *Adams v. Kehlor Mill. Co.*, 38 Fed. 281; *Friedman v. Graham's Adm'r*, 10 La. (O. S.) 440; *Hand v. Savannah & C. Co.*, 21 S. C. 162. In proceedings to wind up a corporation, an attorney acting for the stockholders should recover his fees from the corporate assets (*Whitsett v. City Bldg. & Loan Ass'n*, 3 Tenn. 526); but attorneys acting for the creditors of such corporation should look to the creditors for their compensation (*Moses v. Occident Bank*, 1 Lea [Tenn.] 398; *Hume v. Commercial Bank*, 13 Lea [Tenn.] 496).

⁶⁸⁴ *Northern Pac. R. Co. v. Clarke*, 106 Fed. 794; *Tuttle v. Claff*, 86 Fed. 964; *Mathews v. Gilles*, 108 Ga. 364; *Price v. Hay*, 132 Ill. 54; *Indianapolis Chair Mfg. Co. v. Swift*, 132 Ind. 197; *Barker v. York*, 3 La. Ann. 90; *Wilson v. Minneapolis & N. W. R. Co.*, 31 Minn. 48; *Mussey v. Vanstone*, 82 Mo. App. 353; *Bush v. Southern Brew. Co.*, 69 Miss. 200; *Saxton v. Harrington*, 52 Neb. 300; *American Ins. Co. v. Oakley*, 9 Paige (N. Y.) 496, 38 Am. Dec. 561; *Yerger v. Aik*, 7 Baxt. (Tenn.) 539; *Swayne v. Union M. L. Ins. Co.*, 92 Tex. 51; *Foot v. Rutland & W. R. Co.*, 32 Vt. 633; *Safford v. Vermont & C. Co.*, 60 Vt. 185; *Powell v. First Nat. Bank*, 71 Vt. 462.

⁶⁸⁵ *Windett v. Union M. L. Ins. Co.*, 144 U. S. 581; *Mellen v. Union States*, 13 Ct. Cl. 71; *Pennington v. Underwood*, 56 Ark. 53; *Cr*

on the amount of a bond placed in his hands for collection, where the money is paid into the clerk's office and plaintiff applies in person for it.⁶⁸⁶ Where a client elects solicitor and subsequently adopts a resolution "that the solicitor's salary shall begin when he is notified that his services are required by" the client, and the solicitor accepts the notification, but no notice that his services are required is ever given to him, he cannot recover any salary,⁶⁸⁷ because there has been no performance.

What attorneys may recover compensation—In general.

Only such attorneys as have been duly and properly admitted and admitted to practice in the jurisdiction within which the services were rendered, and are in good standing at the time, may bring an action before such court to recover compensation for legal services rendered to his client.⁶⁸⁸ It is enough that he is a practicing attorney; but it must appear that he has complied with all the qualifications prescribed by statute, such as taking the oath of office, paying required tax, etc.⁶⁸⁹ And where one not licensed is associated with a licensed attorney, they cannot maintain a joint action for the services of either or both, where they act as partners, nor can a lien exist in favor of the two therefor on

re O'Brien, 104 Cal. 217; *In re Kruger's Estate*, 130 Cal. 621; *Ed v. Richland County*, 13 Ill. App. 527; *Pennington v. Nave*, 15 Ill. 23; *Wilson v. Barnes*, 13 B. Mon. (Ky.) 330; *In re Labaure's Estate*, 34 La. Ann. 1187; *Wheeler v. Harrison*, 94 Md. 147; *Davis v. Swedish American Nat. Bank*, 78 Minn. 408; *Dennison v. Law*, 29 Civ. Proc. R. (N. Y.) 176; *Meaney v. Rosenberg*, 32 Misc. 2d 96; *Richards v. Washburn*, 163 N. Y. 585; *Moyers v. Gra*, 5 Lea (Tenn.) 57; *Powers v. Rich*, 184 Pa. 325. *Each v. Strange*, 10 N. C. (3 Hawks) 601. *Fitzpatrick v. Lincoln Sav. & T. Co.*, 194 Pa. 544. *Hittson v. Browne*, 3 Colo. 304; *Bachman v. O'Reilly*, 14 Colo. 108; *Hedrick v. Hiner*, 61 Ill. 189; *Hughes v. Dougherty*, 62 Ill. App. 2d 111; *Hellers v. Phillips*, 37 Ill. App. 74; *Perkins v. McDuffee*, 63 Me. 181; *James v. Gilman*, 10 Metc. (Mass.) 239; *McIver v. Clarke*, 69 N. Y. 408; *Bullard v. Van Tassell*, 3 How. Pr. (N. Y.) 402; *Hall v. Perkins*, 3 Daly (N. Y.) 109. *Perkins v. McDuffee*, 63 Me. 181.

a judgment recovered by the licensed attorney.⁶⁹⁰ When an attorney is disbarred from further practice, during the progress of a suit, since the attorney has become incapable of prosecuting the claim, the consideration for the client's promise of remuneration has failed, and the client has a right to revoke his authority; and the attorney has no right to sue after, upon the revocation of the order of disbarment, to resume his services in the case, and has no right of recovery for services rendered after his disbarment, but only for beneficial services rendered before, and the burden is on him to prove such services.⁶⁹¹ But it has been held that it is not necessary, in an action for attorney's fees, to allege that the person rendering the services was an attorney duly admitted to practice law; and a person performing services in the prosecution of a lawsuit at the request of a party thereto is entitled to reasonable compensation therefor, though not an attorney.⁶⁹²

Under the old statute in Massachusetts an attorney from another state could not recover compensation for services rendered as attorney in the courts of Massachusetts, as the statute provided that a person could not lawfully practice as an attorney in any court of justice within the state who was not admitted as an attorney according to that statute, though he be regularly admitted in another state, and afterwards permanently resided in Massachusetts,⁶⁹³ but since 1836, when the revised statutes took effect, this rule has been changed.⁶⁹⁴

In England it is the rule that counsellors, advocates, and barristers have no right to charge and enforce payment of compensation for their services; but such services are considered as honorary and presumed to be gratuitous.⁶⁹⁵ It is different, however, with regard to attorneys, conveyancers and proctors. Their fees are regulated by statute and the

⁶⁹⁰ *Hittson v. Browne*, 3 Colo. 304.

⁶⁹¹ *Moyers v. Graham*, 15 Lea (Tenn.) 57.

⁶⁹² *Miller v. Ballerino*, 135 Cal. 566.

⁶⁹³ Stat. 1785, c. 23; *Ames v. Gilman*, 10 Metc. (Mass.) 239.

⁶⁹⁴ *Ames v. Gilman*, 10 Metc. (Mass.) 239.

⁶⁹⁵ *Moor v. Row*, 1 Ch. R. 38; *Turner v. Phillips*, 1 Peake N. P. 1; *Kennedy v. Broun*, 13 C. B. (N. S.) 677, 106 E. C. L. 677.

enter into agreements with their clients for their compensation.⁶⁹⁶ But in the United States it is the general rule in most of the states that an attorney has full power to contract with his client, expressly or impliedly, for compensation for his services, and to enforce its payment by an action thereon.⁶⁹⁷

3. Attorneys for infants, married women, etc.

In a late Rhode Island case, where an action for damages for indecent assault was successfully prosecuted by an attorney for an infant, at the instance of her father, as best friend, it was held that the services of the attorney were necessary. And though the suit was instituted and counsel employed through her next friend, yet, since this was of necessity, and since she knew of and profited by the proceedings, and must have conferred with counsel, and appeared as a party, there was an implied promise by her to pay for the necessary counsel fees. And in an action by the attorney to recover from the infant for such services, it was not error to instruct that the father could not bind her estate to a contract for legal services, since the recovery sought was based on her implied promise, and not on a contract of the father.⁶⁹⁸ And an instruction that, "nothing to the contrary appearing, it is presumed that the father provided the

Poucher v. Norman, 3 Barn. & C. 744; *Attorneys' and Solicitors' Act*, 1870, 33 and 34 Vict. c. 28.

Law v. Ewell, 2 Cranch, C. C. 144, Fed. Cas. No. 8,127; *Stanton v. Ambrey*, 93 U. S. 548; *Stevens v. Monges*, 1 Har. (Del.) 127; *Carr v. Bennett*, 6 Fla. 214; *McBratney v. Chandler*, 22 Kan. 692, 31 Rep. 213; *Caldwell's Adm'r v. Shepherd's Heirs*, 6 T. B. Mon. 389; *Rust v. Larue*, 4 Litt. (Ky.) 411, 14 Am. Dec. 172; *Party's Succession*, 3 La. Ann. 517; *Morrison v. Flournoy*, 23 La. 593; *Clay v. Moulton*, 70 Me. 315; *Calvert v. Coxe*, 1 Gill (Md.) 1; *Thurston v. Percival*, 1 Pick. (Mass.) 415; *Brackett v. Sears*, 1 Mich. 244; *Webb v. Browning*, 14 Mo. 354; *Smith v. Davis*, 45 N. J. 566; *Zabriskie v. Woodruff*, 48 N. J. Law, 610; *Hopper v. Ludlow*, 41 N. J. Law, 182; *Strong v. Mundy*, 52 N. J. Eq. 833; *Lorillard v. Robinson*, 2 Paige (N. Y.) 276; *Adams v. Stevens*, 26 Wend. (N. Y.) 485; *Christy v. Douglas*, Wright (Ohio) 485; *Foster v. Jack*, 4 Watts 334; *Balsbaugh v. Frazer*, 19 Pa. 95; *Duncan v. Breithaupt*, 1 Cord (S. C.) 149; *Newnan v. Washington*, Mart. & Y. (Tenn.) 79. *Crafts v. Carr*, 24 R. I. 397.

defendant with all necessities, and she must bind herself for necessities," was too favorable to the defendant, since father is not bound to furnish counsel fees for his minor daughter for the prosecution of an action for her protection and from which her estate receives all the benefit.⁶⁹⁹ But where a suit is brought by the direction of the guardian of an infant, to protect the infant's title to his estate, the counsel cannot recover for his services and expenditures in such suit against the infant, but suit must be against the guardian.⁷⁰⁰ There is a distinction between services rendered to protect the infant's person and services rendered to protect his estate. For the former he may be held liable for necessities, but for the latter suit should be against the guardian who represents the estate.

Where an attorney renders services for a married woman under certain circumstances such services may be regarded as necessities, as where they are rendered necessary by some act of the husband, and the latter may be held liable for compensation therefor.⁷⁰¹ But if such services cannot be considered under the head of necessities, the husband would not be liable for attorney's fees therefor; and this is the rule usually with services rendered for the wife in divorce suits.⁷⁰²

As in the case of other contracts made with married women, infants, etc., a contract for professional service

⁶⁹⁹ *Crafts v. Carr*, 24 R. I. 397.

⁷⁰⁰ *Phelps v. Worcester*, 11 N. H. 51.

⁷⁰¹ *Morris v. Palmer*, 39 N. H. 123; *Smith v. Davis*, 45 N. H. 56; *Warner v. Helden*, 28 Wis. 517, 9 Am. Rep. 515; *Conant v. Burnham*, 133 Mass. 503, 43 Am. Rep. 532; *Langbein v. Schnelder*, 27 Ab. N. C. (N. Y.) 228.

⁷⁰² *Kincheloe v. Merriman*, 54 Ark. 557, 26 Am. St. Rep. 60; *Cook v. Newell*, 40 Conn. 596; *Dow v. Eyster*, 79 Ill. 254; *McCullough v. Robinson*, 2 Ind. 630; *Johnson v. Williams*, 3 G. Greene (Iowa) 9; 54 Am. Dec. 491; *Williams v. Monroe*, 18 B. Mon. (Ky.) 514; *Coffey v. Dunham*, 8 Cush. (Mass.) 404, 54 Am. Dec. 569; *Isbell v. Wells*, 60 Mo. App. 54; *Morrison v. Holt*, 42 N. H. 478, 80 Am. Dec. 12; *Ray v. Adden*, 50 N. H. 82, 9 Am. Rep. 175; *Wing v. Hurlburt*, Vt. 607, 40 Am. Dec. 695. But see *Gossett v. Patten*, 23 Kan. 3, where it is held that a husband is liable for an attorney's fees defending the wife against a suit for divorce by the husband.

le by an attorney with either of the above or with any other person under a disability, is, in general, invalid and no recovery can be had upon it.⁷⁰³ Where an attorney appears for an infant, it will be presumed, in the absence of proof to the contrary, that he was employed by the infant's guardian or next friend.⁷⁰⁴ But where the attorney has, at the request of such person, under a disability, in good faith actually rendered services to him, and they can reasonably be regarded as necessary, he may recover on the ground that such person is liable on a quantum meruit for necessities furnished.⁷⁰⁵

Where an attorney conducts proceedings in lunacy, he cannot maintain an action at law against the committee of the insane for such professional services; the exclusive control of such expenditures belongs to the court that has the final settlement of the committee's accounts. But the estate in the hands of the committee is liable for such services.⁷⁰⁶

4. Attorneys for estates of decedents.

Where an attorney is also the executor of an estate he is entitled only to expenses and disbursements.⁷⁰⁷ And where there is a contest of a will the legatees are made defendants and the executor is more interested in his individual than his representative capacity in seeing the will upheld, the counsel fees should be apportioned between the estate and the legatees.⁷⁰⁸ But in some cases the estate is held not to be chargeable with the attorney's fees.⁷⁰⁹ In any case, where a personal representative is empowered to charge the estate

Lacey v. Willson, 83 Ind. 570; *Pyle v. Cravens*, 4 Litt. (Ky.) 21.

Hilliard v. Carr, 6 Ala. 557.

Barker v. Hibbard, 54 N. H. 539, 20 Am. Rep. 160; *Hallett v. ...*, 1 Cush. (Mass.) 296; *Munson v. Washband*, 31 Conn. 303, 83 Dec. 151; *Nagel v. Schilling*, 14 Mo. App. 576; *Petrie v. Wil- ...*, 68 Hun (N. Y.) 589; *Arkey v. Williams*, 74 Tex. 294; *Thrall*, 38 Vt. 494.

Wier v. Myers, 34 Pa. 377.

Campbell v. Purdy, 5 Redf. (N. Y.) 434. But see *Fulton v. ...*, 3 Heisk. (Tenn.) 643.

Roll v. Mason, 9 Ind. App. 651.

Morvant's Succession, 46 La. Ann. 301; *Titlow's Estate*, 163 5.

with such fees, it cannot be made liable for more than the fair value of the service rendered.⁷¹⁰ An administrator who succeeds an executor, under a will, in the management of the estate, after the will is set aside, will be liable to the attorney out of the funds of the estate in his hands, for services rendered to the executor, before the will was set aside.⁷¹¹

§ 695. Attorneys appointed by the court.

Among an attorney's general duties is the duty, when appointed by the court, to defend persons accused of crime, to see that civil cases are fairly conducted. Such cases are usually regulated by statute, and if the statute makes no provision for compensation, the attorney must depend upon the future possibility of the accused being able to pay; there is no obligation on the part of the county or state, in the absence of statute, to pay for such services.⁷¹² Under the

⁷¹⁰ *Macarty's Succession*, 3 La. Ann. 518; *Lee's Succession*, 4 La. Ann. 578; *Virgin's Succession*, 18 La. Ann. 42; *Sterry's Succession*, 38 La. Ann. 854.

⁷¹¹ *Nave v. Salmon*, 51 Ind. 159.

⁷¹² *United States v. Whelan v. Manhattan R. Co.*, 86 Fed. 219.

Alabama: *Posey v. Mobile County*, 50 Ala. 6.

Arkansas: *Arkansas County v. Freeman*, 31 Ark. 266.

California: *Rowe v. Yuba County*, 17 Cal. 61; *Lamont v. Sonoma County*, 49 Cal. 158; *Lee v. San Joaquin County Super. Ct.*, 112 Cal. 354.

Georgia: *Elam v. Johnson*, 48 Ga. 348; *Creamer v. Creamer*, 48 Ga. 618.

Illinois: *Vise v. Hamilton County*, 19 Ill. 78; *Johnson v. Winnebago County*, 110 Ill. 22.

Indiana: *Howard County Com'rs v. Pollard*, 153 Ind. 371. Compare earlier cases in post, note 713.

Iowa: *Clark v. Osceola County*, 107 Iowa, 502; *State v. Behr*, 109 Iowa, 58; *Iowa Code*, § 5314.

Kentucky: *Jackson v. McElroy*, 2 Bush, 132; *Civ. Code*, § 441.

Louisiana: *State v. Simmons*, 43 La. Ann. 991.

Michigan: *De Long v. Muskegon County*, 111 Mich. 568; *Ann. St.* § 9046.

Mississippi: *Dismukes v. Noxubee County Sup'rs*, 58 Miss. 38 *Am. Rep.* 339.

Montana: *Johnston v. Lewis and Clarke County*, 2 Mont. 18.

Nevada: *Washoe County v. Humboldt County*, 14 Nev. 123.

New York: *People v. Niagara County*, 78 N. Y. 622; *In re K*, 12 Daly, 110; *Code Civ. Proc.* § 460.

a statute is not unconstitutional which authorizes courts record to appoint attorneys to defend persons accused of crime, and requires attorneys so appointed to act in criminal proceedings without compensation, for such a statute merely recognizes an already existing power; it cannot be attacked as taking the attorney's labor and time, or property, without compensation, as such a duty was impliedly assumed of him when he was admitted as an attorney and officer of the court.⁷¹³ "In some instances, no doubt, it is a hardship on an attorney to be obliged to defend poor persons without compensation, but, when called upon, it is a duty which he owes to his profession, to the court engaged in the trial, and to the cause of humanity and justice, not to withhold his assistance, nor spare his best exertions, in the defense of one who has the double misfortune to be stricken with poverty and accused of crime. * * * An attorney is an officer of the court, and he takes his office with all its burdens as well as all its rights and privileges. And among the burdens assumed is that of being obliged, when requested by the court, to conduct, without compensation, the defense of those who are destitute of means and are accused of crime."⁷¹⁴ In some states, however, it is held that the courts cannot require an attorney to defend a criminal, destitute of means, gratuitously, and that statutes authorizing such appointment are unconstitutional as taking private property without compensation. The courts, in such states, have plenty of power to appoint persons to defend such persons and require them to serve, but there is an implied promise in such cases, on the part of the county or state, to pay a reasonable compensation for the services.⁷¹⁵

Ohio: *State v. Montgomery County Com'rs*, 26 Ohio St. 599; *Ohio Cr. Proc.* § 104.

Pennsylvania: *Wayne County v. Waller*, 90 Pa. 99, 35 Am. Rep.

Tennessee: *Wright v. State*, 3 Helsk. 256; *House v. Whitis*, 5 T. 690.

Washington: *Presby v. Klickitat County*, 5 Wash. 329.

⁷¹³ *Samuels v. Dubuque County*, 13 Iowa, 536; *Presby v. Klickitat County*, 5 Wash. 329.

⁷¹⁴ *Presby v. Klickitat County*, 5 Wash. 329.

⁷¹⁵ *Webb v. Baird*, 6 Ind. 13; *Blythe v. State*, 4 Ind. 525; *Baker v.*

In some states, the statutes expressly provide for compensation to attorneys appointed by the court.⁷¹⁶ It is provided by statute in New York that where a counsel is assigned one permitted to sue in forma pauperis he must act without compensation;⁷¹⁷ and he cannot, by an agreement made with his client, withhold part of the money recovered.⁷¹⁸ And that attorney cannot be assigned as counsel who has made the application to allow the plaintiff to sue in forma pauperis unless the case is an exceptional one, and then only when it clearly appears that the party seeking the leave knows that the counsel assigned is bound to act without compensation, and the counsel certifies that he will so act.⁷¹⁹

Where the court appoints an attorney to act in the place of the district attorney, who is absent, the county wherein the term is held is liable for such attorney's services.⁷²⁰ In the county is not liable for the services of an attorney conducting a criminal trial before a justice of the peace, upon the appointment of the latter;⁷²¹ or for an attorney appoint-

Knox County, 18 Ind. 170; Dane County v. Smith, 13 Wis. 585, Am. Dec. 754. And see Cheek v. Schwartz, 70 Ind. 339.

⁷¹⁶ *Alabama*: Commissioner's Court v. Turner, 45 Ala. 199.

Indiana: Fountain County Com'rs v. Wood, 35 Ind. 70; Gordon Dearborn County, 52 Ind. 322; Montgomery County Com'rs v. Conney, 105 Ind. 311.

Michigan: How. St. § 9047; Springer v. Board of Auditors, Mich. 513; People v. Hanifan, 99 Mich. 516.

Missouri: Kelley v. Andrew County, 43 Mo. 338, holding that such an attorney's fees are payable by the state, under the statute and not by the county.

Nebraska: Cr. Code, § 437; Edmonds v. State, 43 Neb. 742.

New York: Code Cr. Proc. § 308; People v. Heiselbetz, 30 A. Div. 199; In re Purdy, 28 Misc. 303; People v. Ferraro, 162 N. Y. 53; People v. Barone, 161 N. Y. 475; People v. Coler, 61 App. Div. 53.

Ohio: Geauga County v. Raney, 13 Ohio St. 388.

Wisconsin: State v. Wentler, 76 Wis. 89; Rev. St. § 4713.

⁷¹⁷ New York Code Civ. Proc. § 460; In re Kelly, 12 Daly (N. Y.) 110.

⁷¹⁸ In re Kelly, 12 Daly (N. Y.) 110.

⁷¹⁹ Harris v. Mutual Ins. Co., 37 N. Y. State Rep. 599.

⁷²⁰ White v. Polk County, 17 Iowa, 413, or where the prosecuting attorney employed him, with leave of the court. Sneed v. Peo, 38 Mich. 248.

⁷²¹ Davis v. Linn County, 24 Iowa, 508.

private party to institute a prosecution under the property liquor law.⁷²²

3. Where compensation is agreed upon—In general.

The attorney and client may, when the contract of employment is entered into, make a special agreement in regard to the former's compensation. They may then agree as to the amount to be paid; the manner of payment; the time at which, and the means by which, it is to be paid. This method of fixing the attorney's compensation is the most usual and the most desirable way of doing so, as by thus making a definite agreement from the beginning of the employment, it does away with any disputes that often otherwise arise if the amount of compensation remains indefinite until the services have been performed, or the employment otherwise ended. The client is supposed to be able to judge for himself what is a fair sum to be paid for the services he wants rendered; and if he, with a knowledge of all the facts, agrees to give his attorney a certain compensation, whether it is a fixed sum or a percentage of the amount recovered, the contract is valid and enforceable, and the rights of both parties are thereby determined, unless they have, by another agreement, waived some or all of its provisions.⁷²³ And such contract, express or implied, may be made although there is a statutory pro-

Blair v. Dubuque County, 27 Iowa, 181.

Stanton v. Embrey, 93 U. S. 548; *Wright v. Tebbitts*, 91 U. S. 548; *Walker v. Clay*, 21 Ala. 797; *Bartlett v. Odd Fellows' Sav. Bank*, 111 Ala. 218, 12 Am. St. Rep. 139; *Reynolds v. Sorosis Fruit Co.*, 133 Ala. 625; *Ripley v. Bull*, 19 Conn. 56; *McDonald v. Napier*, 14 Ga. 625; *Badger v. Gallaher*, 113 Ill. 662; *Gorrell v. Payson*, 170 Ill. 213; *Clark County v. Layman*, 145 Ill. 138; *Union M. L. Ins. Co. v. Hannan*, 100 Ind. 63; *Schaffner v. Kober*, 2 Ind. App. 409; *Boardman v. Thompson*, 25 Iowa, 489; *Browder v. Long's Ex'r*, 23 Ky. 102; *2068*, 66 S. W. 600; *Tapley v. Coffin*, 12 Gray (Mass.) 420; *Camp v. Schenck*, 40 N. J. Law, 195, 29 Am. Rep. 219; *Zabriskie v. Woodruff*, 48 N. J. Law, 610; *Hitchings v. Van Brunt*, 38 N. Y. 111; *Allison v. Scheeper*, 9 Daly (N. Y.) 365; *In re Borkstrom*, 63 N. Y. Div. (N. Y.) 7; *Planters' Bank v. Hornberger*, 4 Cold. (Tenn.) 111; *Bright v. Taylor*, 4 Sneed (Tenn.) 159; *Tennant v. Fawcett*, 94 Va. 111; *Yates v. Robertson*, 80 Va. 475; *Allard v. Lamirande*, 29 Va. 502; *Camden v. McCoy*, 48 W. Va. 377.

vision fixing the attorney's fee to be taxed to the winning party at a definite amount.⁷²⁴

If any conditions have been introduced into the contract the attorney must show, as a prerequisite to his right to recover, either that he has complied with all of the conditions, and has fully and faithfully, on his part, performed the contract,⁷²⁵ or that he has been prevented from doing so by his client.⁷²⁶ An agreement by the client to convey land to his attorney as compensation for services rendered, may be enforced, if the attorney has, in every particular, performed his part of the contract. Where a contract for a stipulated fee has been made, the fact that the attorney has performed much less labor than originally contemplated does not affect his right to such fee if he has thereby accomplished the purpose for which he was employed.⁷²⁸

Where an attorney has made a special contract to prosecute a case to its final termination, he cannot recover for his services on a quantum meruit;⁷²⁹ unless such contract is invalid.⁷³⁰ Under a contract by which one undertakes to pay to an attorney a sum certain for professional services rendered in a particular matter, such attorney is not entitled to recover for professional services rendered by him to the same person in an entirely different matter.⁷³¹

§ 697. Contract for compensation during employment.

A contract, however, entered into by the attorney and client during the continuance of the relation is viewed with much jealousy and scrutiny by the courts, and if an attorney attempts to use the influence begot by the relation to ex-

⁷²⁴ Code of Va. 1887, § 3201; *Yates v. Robertson*, 80 Va. 475.

⁷²⁵ *Moses v. Bagley*, 55 Ga. 283.

⁷²⁶ *Kersey v. Garton*, 77 Mo. 645; *Bates v. Desenberg*, 47 Ill. 643; *Myers v. Crockett*, 14 Tex. 257.

⁷²⁷ *King v. Gildersleeve*, 79 Cal. 504.

⁷²⁸ *Browder v. Long's Ex'r*, 23 Ky. L. R. 2068, 66 S. W. 2d 551; *Shakespeare v. Baughman*, 113 Mich. 551.

⁷²⁹ *Bull v. St. Johns*, 39 Ga. 78.

⁷³⁰ *French v. Cunningham*, 149 Ind. 632.

⁷³¹ *Wells v. Haynes*, 101 Ga. 841.

on his client an excessive fee, by means of an unreasonable or unfair contract, a court of equity will grant relief, and will limit the attorney's compensation to a reasonable amount.⁷³² "All contracts between attorney and client, made before the formation of the relation, touching the compensation of the attorney, or by which the client transfers to him an interest in the matter of suit, or a right or interest in and property involved in litigation, are closely watched, and are scrupulously scrutinized, when as between them their validity is in question. The confidence the relation involves, the power over the client the attorney naturally acquires, the opportunity and danger of oppression and the exercise of influence, compel courts to a most jealous supervision of all such contracts; and as between attorney and client, they are supported only when all the circumstances attending them warrant the belief that they are fair, just, and untainted with an abuse of the relation."⁷³³ And in such cases the burden is on the attorney to show that the contract is just, fair, and reasonable.

An attorney cannot make an agreement with his client

Manning v. Clark, 40 Fed. 121; *Lazarus v. McDonald*, 97 Fed. 273; *Lecatt v. Sallee*, 3 Port. (Ala.) 115, 29 Am. Dec. 249; *Ware's Adm'r v. Russell*, 70 Ala. 174, 45 Am. Rep. 83; *Elmore v. Johnson*, 111 Ala. 513, 36 Am. St. Rep. 401; *Judah v. Vincennes University*, 23 Ind. 273; *French v. Cunningham*, 149 Ind. 632; *Ryan v. Ashton*, 111 Iowa, 365; *Shropshire v. Ryan*, 111 Iowa, 677; *Bibb v. Smith*, 111 Ky. 580; *Phillips v. Overton*, 4 Hayw. (Tenn.) 292; *Rose v. Synnatt*, 7 Yerg. (Tenn.) 36; *McMahan v. Smith*, 6 Heisk. (Tenn.) 567; *Planters' Bank v. Hornberger*, 4 Cold. (Tenn.) 567; *Newman v. Laredo*, 9 Baxt. (Tenn.) 538; *Waterbury v. City of Laredo*, 9 Baxt. 565; *Thomas v. Turner's Adm'r*, 87 Va. 1; *Allard v. Lamiere*, 29 Wis. 502; *Camden v. McCoy*, 48 W. Va. 377. If a person charged with murder, employs an attorney when he is put in jail, and requests him to fix his fee, which he refuses to do until further investigation, and the attorney, after a preliminary examination, but a few days before the convening of the grand jury, upon the insistence of his client and during the existence of the confidential relation, fixes his fee at a large amount, upon the basis of work that may have to be done, and demands a note and mortgage therefor, the law presumes the transaction to be fraudulent and the fee excessive. *Shirk v. Neible*, 156 Ind. 66, 83 Am. St. Rep. 150.

Ware's Adm'r v. Russell, 70 Ala. 174, 45 Am. Rep. 83.

after his employment in a particular business has commenced by which he is to receive a greater compensation than was originally agreed upon; or than he would have a right to demand if no contract should be made during the relation; nor can he, pending a suit, take from his client security for a greater sum than is actually due.⁷³⁵ If, however, such a contract for fees has been acted upon for a long time, it will not be disturbed by the court.⁷³⁶ And although offers of compensation made by a client to his attorney during the existence of the relation are valid only to the extent of a reasonable and proper compensation, yet they may be admitted in evidence for the purpose of showing the client's estimate of a proper compensation.⁷³⁷

In some states statutes have been passed, authorizing attorney and client to enter into such contracts for fees; but these statutes affect only contracts made before the relation existed, and do not alter the common law rule that an attorney must prove affirmatively that his contract with a client, during the continuance of the relation, is fair and free from imposition or fraud in every respect.⁷³⁸

— **After the relation is terminated.** But where the litigation in which the attorney had been employed is ended and the relation has ceased, the reason for the rule no longer applies, and equity will not interfere with any contract as to compensation which may then be made between the parties.⁷⁴⁰

⁷³⁴ *Dickinson v. Bradford*, 59 Ala. 581, 31 Am. Rep. 23; *Mars v. Dossett*, 57 Ark. 93; *Elmore v. Johnson*, 143 Ill. 513, 36 Am. Rep. 401; *Hughes v. Zeigler*, 69 Ill. 38; *Cassem v. Heustis*, 201 Ill. 208, 94 Am. St. Rep. 160; *In re Maires*, 7 Pa. Dist. R. 297; *Waterbury v. Laredo*, 68 Tex. 565.

⁷³⁵ *Polson v. Young*, 37 Iowa, 196; *Mott v. Harrington*, 12 Vt. 19.

⁷³⁶ *Smith v. Thompson's Heirs*, 7 B. Mon. (Ky.) 305; *Elmore v. Johnson*, 143 Ill. 513, 36 Am. St. Rep. 401.

⁷³⁷ *Randall v. Packard*, 1 Misc. 344, 142 N. Y. 47.

⁷³⁸ *Beals v. Wagener*, 47 Minn. 489.

⁷³⁹ Code Va. 1887, § 3201; *Thomas v. Turner's Adm'r*, 87 Va. 200; *New York Code Civ. Proc.* § 66; *Whitehead v. Kennedy*, 69 N. Y. 400; *Mason v. Ring*, 3 Abb. Dec. (N. Y.) 219.

⁷⁴⁰ *Phillips v. Overton*, 4 Hayw. (Tenn.) 291; *McElrath v. Dupont*, 2 La. Ann. 521.

98. Contracts for contingent fees.

It often happens that an attorney and his client enter into an agreement for contingent fees, that is, that the attorney's fee to an agreed fee shall depend upon the success of the suit or the happening of some other contingency. Although such contracts will be closely scrutinized by the court, and rejected against if it is shown that they were obtained from the client or by any undue influence of the attorney over him, or by any fraud or imposition, or that the compensation is grossly excessive, so as to amount to extortion;⁷⁴¹ yet they are not necessarily invalid, or within the rule against champerty and maintenance, and in the absence of any of the above objections they will be held binding.⁷⁴² Such contracts, however, should be characterized by the utmost good faith on the part of the attorney toward his client, because of the confidence reposed in him. The courts will scrutinize such contracts closely, to see that the highest good faith has been preserved.⁷⁴³ And the fact that the attorney, by such contract,

Taylor v. Bemiss, 110 U. S. 42; *Henry v. Vance*, 23 Ky. L. R. 63 S. W. 273. See *Potts v. Francis*, 43 N. C. (8 Ired. Eq.) 300. *Taylor v. Bemiss*, 110 U. S. 42; *Stanton v. Embrey*, 93 U. S. 571; *Wylie v. Coxe*, 15 How. (U. S.) 415; *Muller v. Kelly*, 116 Fed. 279; *Brodie v. Watkins*, 33 Ark. 545, 34 Am. Rep. 49; *Rector v. Rose*, 33 Ark. 279; *Ballard v. Carr*, 48 Cal. 74; *Bergen v. Frisbie*, 125 Cal. 415; *Stanton v. Haskin*, 1 McArthur (D. C.) 558, 29 Am. Rep. 612; *Sell v. Lindsay*, 50 Ga. 360; *Newkirk v. Cone*, 18 Ill. 449; *Smith v. Young*, 62 Ill. 210; *Funk v. Mohr*, 185 Ill. 395; *Ramsey's Devises*, 10 B. Mon. (Ky.) 336; *Wilhite v. Roberts*, 4 Dana (Ky.) 100; *Rust v. Larue*, 4 Litt. (Ky.) 411, 14 Am. Dec. 172; *Manning v. Perkins*, 85 Me. 172; *Cain v. Warford*, 33 Md. 23; *Blaisdell v. Brown*, 144 Mass. 393, 59 Am. Rep. 99; *Davis v. Com.*, 164 Mass. 241; *Key v. Baird*, 9 Mich. 32; *Duke v. Harper*, 66 Mo. 51, 27 Am. Rep. 181; *Porter v. Parmly*, 39 N. Y. Super. Ct. 219; *Marsh v. Holbrook*, 100 N. Y. 176; *In re Hynes*, 105 N. Y. 560; *Reece v. Kyle*, 100 N. Y. 475; *Perry v. Dicken*, 105 Pa. 83, 51 Am. Rep. 181; *Butler County v. Barber*, 97 Pa. 463; *Fellows v. Smith*, 190 Pa. 301; *Part v. Houston & T. C. R. Co.*, 62 Tex. 246; *Wheeler v. Riviere*, 49 S. W. 697; *Potter v. Ajax Min. Co.*, 22 Utah, 273; *Wor's Ex'r v. Gibson*, 1 Patt. & H. (Va.) 48; *Allard v. Lamirande*, 51 Wis. 502; *Kusterer v. City of Beaver Dam*, 56 Wis. 471, 43 Am. Rep. 725; *Gilchrist v. Brande*, 58 Wis. 184. And see a good note on this topic in 83 Am. St. Rep. 175. *Davis v. Webber*, 66 Ark. 190, 74 Am. St. Rep. 81.

agrees to take part of the subject-matter recovered in litigation, as his compensation, does not make it invalid unless made in violation of some statute;⁷⁴⁵ or unless it is a contract to render unprofessional services;⁷⁴⁶ or some undue advantage is taken of the client;⁷⁴⁷ or is against public policy.⁷⁴⁸ A provision in such a contract preventing the attorney from settling the controversy without the consent of the attorney, if it furnishes an inducement for entering into the contract, is against public policy, and renders the contract void.⁷⁴⁹ So an agreement by an attorney to procure for a contingent fee the quashing of a criminal prosecution is void.⁷⁵⁰ So a contract made to defend persons for criminal offenses, which were in the contemplation of the parties,

⁷⁴⁴ *Howard v. Throckmorton*, 48 Cal. 482; *Duke v. Harper*, 10 Mo. 51, 27 Am. Rep. 314; *Martin v. Platt*, 5 N. Y. State Rep. 10; *Davis v. Webber*, 66 Ark. 190, 74 Am. St. Rep. 81; and see cases cited in preceding note, 742.

⁷⁴⁵ *Hall v. Gird*, 7 Hill (N. Y.) 586; *Voorhees v. Dorr*, 51 N. Y. 580; *Sedgwick v. Stanton*, 14 N. Y. 289; *Lynch v. Peck*, 10 Tex. Civ. App. 62 S. W. 945.

⁷⁴⁶ *Harris v. Roof's Ex'rs*, 10 Barb. (N. Y.) 489.

⁷⁴⁷ *Davis v. Webber*, 66 Ark. 190, 74 Am. St. Rep. 81.

⁷⁴⁸ *Newman v. Freitas*, 129 Cal. 283; *Brindley v. Brindley*, 121 Cal. 429; *Platte County v. Gerrard*, 12 Neb. 244. An attorney who recovers compensation for purely professional services performed in procuring legislation in which his client is interested; but where the agreement between attorney and client provides for compensation contingent on the amount recovered under such legislation, the contract procured by the attorney the contract is against public policy and cannot be enforced. *Spalding v. Ewing*, 149 Pa. 375, 34 Am. Rep. 608; *Trist v. Child*, 21 Wall. (U. S.) 441. A contract between a wife and her solicitor, providing that, for his services in procuring an allowance of alimony and enforcing its payment, he should receive a share of the alimony recovered, is void, not only because the claim for alimony is incapable of assignment, but also because the contract is in contravention of public policy. *Lynde v. Lynde*, 64 N. J. Eq. 736, 58 L. R. A. 471.

⁷⁴⁹ *Davis v. Webber*, 66 Ark. 190, 74 Am. St. Rep. 81; *Boardman v. Thompson*, 25 Iowa, 487; *North Chicago St. R. Co. v. Ackley*, 111 Ill. 100; *Key v. Vattier*, 1 Ohio, 132.

⁷⁵⁰ *Ormerod v. Dearman*, 100 Pa. 561, 45 Am. Rep. 391; *Webb v. Shay*, 56 Ohio St. 116, 60 Am. St. Rep. 743.

committed in the future, at a monthly compensation, is against public policy, and void.⁷⁵¹

99. What contracts for contingent fees are champertous and void.

It is the policy of the law to discourage, as far as possible, litigation and to encourage speedy and peaceful settlements of lawsuits, and to uphold everything that tends to justice and purity in the conduct of suits in the different courts. For this reason they look with disfavor upon any contract or agreement made by an attorney that tends to increase litigation or prolong the settlement of lawsuits. Therefore the law makes void, as opposed to public policy, any contracts that savor of champerty or maintenance.

— **Common law rule.** At common law, champerty was generally held to be that as declared by Blackstone: "A bargain with the plaintiff or defendant *campum partire*, to divide the land or other matter sued for between them, if they prevail at law; whereupon the champertor is to pay on the party's suit at his own expense." And this doctrine of champerty is the law of those states which have adopted the common law, unless modified by acts of legislature.⁷⁵² From this it will be seen that "to constitute champerty, two things are necessary: 1st. That the contract of employment] be made before the com-

Bowman v. Phillips, 41 Kan. 364, 13 Am. St. Rep. 292.
Peck v. Heurich, 167 U. S. 624; *Bayard v. McLane*, 3 Har. (L.) 212; *Moses v. Bagley*, 55 Ga. 283; *Meeks v. Dewberry*, 57 Ga. 212; *Thompson v. Reynolds*, 73 Ill. 11; *Geer v. Frank*, 179 Ill. 570; *Kirk v. Cone*, 18 Ill. 449; *Board of Com'rs v. Jameson*, 86 Ind. 100; *Jewel v. Neidy*, 61 Iowa, 299; *Boardman v. Thompson*, 25 Iowa, 232; *Knadler v. Sharp*, 36 Iowa, 232; *Aultman v. Waddle*, 40 Kan. 232; *Moody v. Harper*, 38 Miss. 599; *Benedict v. Stuart*, 23 Barb. (N. Y.) 421; *Ogden v. Des Arts*, 4 Duer (N. Y.) 283 (but see later doctrine, post, note 757); *Martin v. Amos*, 35 N. C. (13 Ired.) 202; *Wattler v. Vattler*, 1 Ohio, 132; *Martin v. Clarke*, 8 R. I. 397, 5 Am. St. Rep. 586; *Orr v. Tanner*, 12 R. I. 94; *Hayney v. Coyne*, 10 Heisk. (Tenn.) 339; *Stearns v. Felker*, 28 Wis. 594; *Allard v. Lamirande*, 54 Wis. 502; *Kelly v. Kelly*, 86 Wis. 170; and see a good note on this topic in 83 Am. St. Rep. 167.

mencement of the suit, and be the moving cause of commencement. 2d. That it be agreed by the party undertaking it that he will carry it on at his own expense. And to these may be added a third, that the consideration to the attorney, for his undertaking, shall be a part of the proceeds recovered by such suit. Thus it has been held in Iowa that a contract by an attorney to pay any final judgment that might be rendered against the client, in consideration that the client should appeal from the judgment, pay him for his services on such appeal, was void as against public policy and not enforceable by the client.⁷⁵⁴ But an agreement between an attorney and the owner of a judgment that the attorney shall have one-half he may collect, is

⁷⁵³ *Moody v. Harper*, 38 Miss. 601.

⁷⁵⁴ *Adye v. Hanna*, 47 Iowa, 264, 29 Am. Rep. 484. The court saying: "In another respect it is in conflict with the policy of the law, which promotes and upholds purity and justice in the administration of remedies in the courts. The attorneys bound by the contract become liable in the place of their client. They have the most powerful motive to pervert justice and corrupt its source in order to escape the liability they have assumed. They are officers of the court, and as such ought to be trusted by judges as well as clients. Their duty does not require them to pervert the law or to deceive those clothed with the power to administer it. On the contrary, it forbids them, under the heaviest penalties, to do an act that may have such an effect. They are to aid the court in the administration of justice. Their duty requires them to endeavor to secure to their clients their rights under the law and nothing more. For such services the law will secure them compensation from their clients. It requires neither arguments nor explanations to show what great temptations would be placed before the attorney to violate his duty, and to endeavor to corrupt the fountain of justice, were he to take the place of his client, and become responsible for all liabilities incident to a decision adverse to him. The law will not permit members of the legal profession to be assailed with temptations so dangerous in their character. They have the most grave duties to perform in the administration of justice; they stand before the world, as a class, distinguished by honor, integrity, and public virtue. The law will be careful to recognize no rules or principles which, in their application to the practice of the courts or business of attorneys, may tend to corrupt the legal profession, or rob it of the high character it has always maintained."

perpetuous.⁷⁵⁵ An assignment of a note to an attorney, in consideration of his agreement to bring suit thereon at his expense, and divide with the assignor whatever sum he recovers, is champertous and void.⁷⁵⁶

— **Other rules.** But in those states where the common law doctrines of maintenance and champerty have not been abolished, it is not contrary to law or to public policy for an attorney to contract to receive part of the land or other property recovered as his compensation, even though he also agrees to pay all costs and expenses of the suit.⁷⁵⁷ Thus it is held to be valid for a party claiming title to land to enter into a contract with an attorney by which it is agreed that the attorney shall commence legal proceedings for its recovery and pay the costs, and in consideration of his services and disbursement of money have an undivided one-half of all the money recovered or obtained by reason of any compromise or settlement of the matter, and that the party claiming the money shall not make any settlement or compromise without the consent of the attorney.⁷⁵⁸

In other jurisdictions there seems to be a tendency to hold champertous and void even mere agreements to receive part of the money or matter recovered as compensation for his services.

Moody v. Harper, 38 Miss. 601.

Roberts v. Yancey, 94 Ky. 243, 42 Am. St. Rep. 357.

Mathewson v. Fitch, 22 Cal. 86; *Hoffman v. Vallejo*, 45 Cal.

Ballard v. Carr, 48 Cal. 74; *Howard v. Throckmorton*, 48 Cal.

Bentlinck v. Franklin, 38 Tex. 458; *Omaha & R. V. R. Co. v.*

Wright, 39 Neb. 27; *Schomp v. Schenck*, 40 N. J. Law, 196, 29 Am.

219.

It is held in New York that the common law doctrine of champerty and maintenance no longer obtains, and that a contract by which an attorney agrees to conduct litigation for a share of the recovery and pay all costs is valid. Code Civ. Proc. § 74; *Browne v. East*, 9 App. Div. (N. Y.) 135; *Sedgwick v. Stanton*, 14 N. Y. 219; *Fowler v. Callan*, 102 N. Y. 395. In *Matter of Fitzsimons*, 174 N. Y. 15, reversing 77 App. Div. 345, it is held that an agreement between an attorney and client by which the former is to be paid one-half of any money that should be obtained in a litigation about which is instituted, out of which amount he agrees to compensate an attorney associated with him in the case is not champertous within the meaning of section 74 of the Code of Civil Procedure.

Hoffman v. Vallejo, 45 Cal. 564.

services.⁷⁵⁹ These authorities seem to base their decision upon the ground that the fact that the attorney conducts the suit is as much aiding in the maintenance thereof as if he actually paid money out of his pocket therefor. It has been said: "When it is considered that champerty is a species of maintenance, it is clear that all these decisions import that the party bargaining for an interest in the thing in dispute, undertakes to aid in the prosecution of the suit for its recovery, and whether such aid is furnished in money by a layman, who pays the expenses of the suit, or by an attorney or solicitor, in services rendered in its prosecution, it is the same, and each alike in effect in contemplation of law is a maintainer of the suit, and prosecutes it in whole or in part at his own expense."⁷⁶⁰ In these jurisdictions it is not considered champertous to contract for a fee, equal to a certain per cent. of the amount recovered.⁷⁶¹

The common law doctrine, however, is more generally disapproved; and it is considered an essential element of champerty that the attorney contribute to or pay all the expenses of the suit.

⁷⁵⁹ *Holloway v. Lowe*, 7 Port. (Ala.) 488; *Byrd v. Odem*, 9 Ala. 755; *Poe v. Davis*, 29 Ala. 683; *Scobey v. Ross*, 13 Ind. 117; *Brown v. Beauchamp*, 5 T. B. Mon. (Ky.) 413, 17 Am. Dec. 81; *Russell v. Larue*, 4 Litt. (Ky.) 419, 14 Am. Dec. 172; *Davis v. Sharron*, 1 T. B. Mon. (Ky.) 64; *Thurston v. Percival*, 1 Pick. (Mass.) 415; *Larue v. Amherst Bank*, 9 Metc. (Mass.) 489; *Backus v. Byron*, 4 Mich. 535; *Slade v. Rhodes*, 22 N. C. (2 Dev. & B. Eq.) 24. In Alabama champerty is defined as "the unlawful maintenance of a suit in consideration of some bargain to have a part of the thing in dispute, or some profit out of it; and covers all transactions and contracts, whether by counsel or others, to have the whole or part of the thing or damages recovered." *Ware's Adm'r v. Russell*, 1 Ala. 174, 45 Am. Rep. 83. An agreement by an attorney to prosecute a suit in which he had no previous interest, and to receive as compensation all that might be recovered not in excess of a stipulated sum, and nothing if the case is lost, is contrary to public justice and professional duty, and is champertous and void. *Brown v. Legro*, 62 N. H. 350, 13 Am. St. Rep. 573; *Christie v. Sawyer*, 1 N. H. 298.

⁷⁶⁰ *By Green, J., in Backus v. Byron*, 4 Mich. 535.

⁷⁶¹ *Ramsey's Devisees v. Trent*, 10 B. Mon. (Ky.) 336; *Evans v. Bell*, 6 Dana (Ky.) 479.

the litigation, in consideration of his receiving a part of the matter in litigation or some profit out of it, as his compensation.⁷⁶² In some states the doctrine of champerty is governed by statutes; and provisions are made leaving the attorney at liberty to make, with his client, such contract regarding to his compensation as they may think to their interests.⁷⁶³ But under such statutes it is not competent for an attorney, in consideration thereof, to agree to pay the entire fees and costs of suit thereafter to be commenced.⁷⁶⁴ It has been held champertous for the attorney to agree to depend alone to the fund or matter that may be recovered for his compensation, and that there shall be no personal liability on the client.⁷⁶⁵ But where the attorney does not agree to depend alone upon the fund or matter recovered for his compensation, and still reserves a right of action against the client therefor, the mere fact that the proceeds of the suit or part thereof are pledged as security for his fees does not make the agreement champertous.⁷⁶⁶

— **Effect on quantum meruit.** In some jurisdictions it is held that the mere fact that the attorney has entered into a champertous contract with his client for compensation

Bayard v. McLane, 3 Har. (Del.) 212; *Moses v. Bagley*, 55 Ga. 291, 601; *Jewell v. Neidy*, 61 Iowa, 299; *Winslow v. Central R. Co.*, 71 Iowa, 197; *Moody v. Harper*, 38 Miss. 601; *Duke v. Harper*, 66 Mo. 51, 27 Am. Rep. 314; *Benedict v. Stuart*, 23 Barb. (N. Y.) 421; *Arden v. Patterson*, 5 Johns. Ch. (N. Y.) 44; *Martin v. Clarke*, 8 R. I. 389, 5 Am. Rep. 586; *Allard v. Lamirande*, 29 N. H. 502; *Dockery v. McLellan*, 93 Wis. 381; *Miles v. Mutual R. F. Ass'n*, 108 Wis. 421. And see cases cited ante, note 752.

How. St. Mich. § 9004; *Code Va.* 1887, § 3201; *Laws Utah* 1896, § 3683; *Croco v. Oregon Short Line R. Co.*, 18 Utah, 321; *Harper v. Ajax Min. Co.*, 22 Utah, 273.

Croco v. Oregon Short Line R. Co., 18 Utah, 321; *In re Evans*, 18 Utah, 366, 83 Am. St. Rep. 794.

Belding v. Smythe, 138 Mass. 530; *Ackert v. Barker*, 131 Mass. 100.

Anderson v. Radcliffe, El. Bl. & El. 806; *Christie v. Sawyer*, 109 H. 298; *McPherson v. Cox*, 96 U. S. 404; *Scott v. Harmon*, 109 U. S. 237, 12 Am. Rep. 685; *Tapley v. Coffin*, 12 Gray (Mass.) 420; *Harper v. Harper*, 66 Mo. 51, 27 Am. Rep. 314.

the absence of statutes, an attorney's contract for a contingency fee gives him no such interest in the cause, before settlement, as will prevent or affect a settlement or compromise made between the client and opposite party, without the attorney's assistance, even though the other party knew of the attorney's contract;⁷⁷³ and even though after verdict, a settlement was before judgment;⁷⁷⁴ and a stipulation in a contract for attorney's fees for prosecuting a suit, that the client should not settle the controversy without the attorney's consent, is void, as against public policy.⁷⁷⁵ If, however, this settlement must be made in good faith and not fraudulently or collusively between the parties, so as to defraud the attorney of his just fees.⁷⁷⁶ Thus attorneys at law who have agreed with the plaintiff that they shall receive a certain compensation for their services in prosecuting a certain litigation, one-third of whatever is realized as the result of the action or of any settlement thereof, are not assignees of the plaintiff as to any part of his cause of action, and there-

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fore are not entitled to have vacated a dismissal of the case made or authorized by him, without their consent.⁷⁷⁷

§ 701. Effect of settlement on attorney's right to continue fees.

And where the attorney contracts for a contingent fee where he agrees not to charge unless successful, and the client interferes in the cause by compromising or dismissing the case without the attorney's assistance and thus prevents the attorney from successfully prosecuting the cause, the latter is at least recover from the client the reasonable value of the services already rendered, but not the contingent fee in the absence of special circumstances permitting it.⁷⁷⁸ Even if the client will not permit the client to plead the non-success of the cause, attorney or the non-happening of the contingency, the fact is a defense to the attorney's claim for compensation, where the success of the cause or happening of the contingency has been prevented by the client's own acts. If, however, it can be shown that the attorney's efforts would have been successful in any event, and his right to compensation depends upon the success of the cause, he can recover nothing, although the client does compromise the case.⁷⁷⁹

§ 702. Liability of client for extra compensation.

As a general rule, when an attorney agrees, for a special compensation, to conduct a case, or other legal matter

⁷⁷⁷ *Cameron v. Boeger*, 200 Ill. 84, 93 Am. St. Rep. 165.

⁷⁷⁸ *Jacks v. Thweatt*, 39 Ark. 340; *Bogert v. Adams*, 8 Colo. 185; *Swift v. Register*, 97 Ga. 446; *French v. Cunningham*, 14 Ill. 632; *Larned v. Dubuque*, 86 Iowa, 166; *Rickel v. Chicago, R. & N. W. Ry. Co.*, 112 Iowa, 148; *Topeka Water Supply Co. v. Root*, 56 Kan. 187; *Bowser v. Patrick*, 23 Ky. L. R. 1578, 65 S. W. 824; *Union Tel. Co. v. Semmes*, 73 Md. 9; *Millard v. Jordan*, 76 Mo. 131; *Kersey v. Garton*, 77 Mo. 645; *Duke v. Harper*, 8 Mo. 296; *Quint v. Opher Silver Min. Co.*, 4 Nev. 305; *Badger v. M. & N. Co.*, 8 Misc. (N. Y.) 533 (see *Bittner v. Gomprecht*, 28 Misc. [1] 218); *Myers v. Crockett*, 14 Tex. 257; *Hill v. Cunningham*, 28 Tex. 25; *Potter v. Ajax Min. Co.*, 22 Utah, 274; *Polsley v. Anderson*, 7 Va. 202, 23 Am. Rep. 613.

⁷⁷⁹ *Merchants' Nat. Bank v. Eustis*, 8 Tex. Civ. App. 350; *W. Munson* (Tex. Civ. App.) 61 S. W. 140.

contemplated that the fixed amount is to cover all services are ordinarily or necessarily incidental to the proper conduct of such case or matters, and the attorney is not entitled to extra compensation for the rendering of such services. But where, with the client's assent, he renders services, which were clearly not contemplated as probable or necessary at the time of making the contract, but are rendered necessary by unexpected and unusual developments in the progress of the cause, the attorney would be entitled to extra compensation on the ground that the original agreement did not cover them, and that there was an implied agreement by the client to pay therefor.⁷⁸¹

**Liability of client for services on an implied contract—
In general.**

We have just been considering the client's liability for the attorney's compensation, when there was an express contract in regard thereto, between the parties. But there are many cases in which the attorney has been employed by the client to perform services, without any special agreement being made as to what he is to receive for such services performed. In all such cases there is a presumption that the services were to be paid for, and that they were not to be performed gratuitously.

In such cases, then, as a general rule, there is an implied

Hughes v. Dundee Mortg. Co., 140 U. S. 98; *Tuttle v. Clafin*, 122; *Lindsay v. Colbert*, 112 Ala. 409; *Moses v. Bagley*, 55; *Dyer v. Sutherland*, 75 Ill. 583; *Baldwin v. School City of Portland*, 73 Ind. 346; *Lindsay, Salinger & Co. v. Carpenter*, 90; *Schamberg v. Auxier*, 19 Ky. L. R. 548, 40 S. W. 911; *Wake v. Crosby*, 81 Me. 249; *In re Maxwell*, 4 N. Y. Supp. 576; *Challenger*, 10 Daly (N. Y.) 57; *Batterson v. Osborne*, 18 N. Y. 31.

Honey v. Bergin, 41 Cal. 423; *Singer v. Steele*, 125 Ill. 426; *Payson*, 170 Ill. 213; *Sanders v. Seelye*, 128 Ill. 631; *Louisiana & C. R. Co. v. Reynolds*, 118 Ind. 170; *Calvert v. Coxe*, 1 (d.) 95; *Allen v. Baker*, 29 Misc. (N. Y.) 337; *Cranmer v. S.*, 15 S. D. 234; *Clarke v. Faver* (Tex. Civ. App.) 40 S. W. *Headley v. Good*, 24 Tex. 232; *Howard v. First Nat. Bank (Va.)*, 492; *Isham v. Parker*, 3 Wash. 755. Compare *Niagara F. v. Hart*, 13 Wash. 651.

agreement that the attorney shall receive for his services, what such services are reasonably worth, due regard being had to the skill and standing of the attorney, the responsibility involved, the nature of the case, and the result of his efforts.⁷⁸² "He [the attorney] should be paid, then, for his services were reasonably worth, not according to what they produced to his client, but what such services, in themselves considered, were reasonably worth, looking at the time, labor, talent, and skill expended in the bestowment of them."⁷⁸³ An attorney cannot claim half of the amount recovered because the debt was desperate, but he should prove his services and recover the usual compensation. And where there are several suits of the same character, the determination of one of which will determine all the others, counsel cannot recover the same for each suit, if each had been litigated separately, but must be limited to a reasonable compensation for the case tried, and a nominal one for the others.⁷⁸⁵ Where two attorneys are

⁷⁸² *Middleton v. Bankers' & Merchants' Tel. Co.*, 32 Fed. 524; *Lard v. Williams*, 10 Colo. App. 140; *Bayard v. McLane*, 3 Har. (Ct.) 139; *Wells v. Haynes*, 101 Ga. 841; *Bingham v. Spruill*, 97 Ill. 374; *Cooper v. Hamilton*, 52 Ill. 119; *McMannomy v. Chicago, V. R. Co.*, 167 Ill. 497; *Stevens v. Ellsworth*, 95 Iowa, 231; *Dow v. Major*, 2 Dana (Ky.) 228; *Fryer v. Dicken*, 20 Ky. L. R. 61; *S. W. 341*; *Macarty's Succession*, 3 La. Ann. 517; *Calvert v. C. Gill* (Md.) 123; *Hyde v. Moxie Nerve Food Co.*, 160 Mass. 1; *Eggleston v. Boardman*, 37 Mich. 14; *Webb v. Browning*, 1 Mich. 354; *Taussig v. St. Louis & K. R. Co.*, 166 Mo. 28, 89 Am. St. 674; *Wright v. Baldwin*, 51 Mo. 269; *Rose v. Spies*, 44 Mo. 674; *Smith v. Davis*, 45 N. H. 566; *Strong v. Mundy*, 52 N. J. Eq. 341; *Starin v. New York*, 106 N. Y. 82; *Van Every v. Adams*, 42 Super. Ct. 126; *Crosby v. Kropf*, 33 App. Div. (N. Y.) 446; *G. v. Murphy*, 7 Okl. 91; *Taggart v. Hower* (Pa.) 17 Atl. 13; *G. v. Banigan*, 22 R. I. 22; *Cranmer v. Building & Loan Ass'n*, 6 R. I. 341; *Butler v. King* (Tenn. Ch. App.) 48 S. W. 697; *Planters' v. Hornberger*, 4 Cold. (Tenn.) 567; *Newman v. Davenport*, 9 (Tenn.) 544; *Britt v. Burghart*, 16 Tex. Civ. App. 78; *VI. Downer*, 21 Vt. 419; *Cullop v. Leonard*, 97 Va. 256.

⁷⁸³ *People v. Delaware County*, 45 N. Y. 202.

⁷⁸⁴ *Christy v. Douglas*, *Wright* (Ohio) 485.

⁷⁸⁵ *Brackett v. Sears*, 15 Mich. 244. Compare *Bruce v. Dicke*, Ill. 527, where it is held that where an attorney at law, employ

employed in a case, each is entitled to recover for reasonable value of his own services, in the absence of a different contract; and one is not entitled to recover more than one-half of the value of the services of both attorneys.

As formerly held in New York, in certain cases, that the amount of compensation recoverable by an attorney, was reduced by the taxable costs, in the absence of a special agreement otherwise,⁷⁸⁷ but this rule has been changed by the cases under the statute.⁷⁸⁸

An action on a claim for professional services cannot be maintained on a quantum meruit, where the employment was in addition that the amount was to be fixed by defendant's agent, and they have neither refused to fix it, nor repudiated the agreement.⁷⁸⁹

What services may be charged for.

When an attorney is employed professionally, no line can be drawn between the professional services that he performs in the course of his employment, and such other services as he performs, but which might be performed just as well by another, not an attorney, and for that reason are

When in two or more suits involving the same questions, makes an agreement with plaintiff's counsel whereby only one suit is to be tried, and the other is to abide its result, and the test case is tried, and decided in favor of the defense, whereupon the other cases are dismissed, the services of the attorney in the test case are to be considered also in the other or others, and he may recover reasonable value of his services in the case not tried in fact; and the fact that he is paid for his services in the test case will not at all impair his right of recovery in respect to the cases not tried. And see *In re Metropolitan Coal Consumers' Ass'n.*, 100 N. D. Div. 606.

MacDonald v. Tittmann, 96 Mo. App. 536.

Farland v. Crary, 8 Cow. (N. Y.) 253; *Richardson v. Brooklyn & N. R. Co.*, 15 Abb. Pr. (N. Y.) 342, note; *Scott v. Elmenor*, 1 Johns. (N. Y.) 315.

Marin v. City of New York, 106 N. Y. 82; *Garr v. Mairret*, 1 N. Y. 498; *Easton v. Smith*, 1 E. D. Smith (N. Y.) 318; *Hamlin*, 11 How. Pr. (N. Y.) 452; *Sandford v. Ruckman*, 1 N. Y. Pr. (N. Y.) 521.

Boche v. Baldwin, 135 Cal. 522.

not strictly professional.⁷⁹⁰ Of course if he performs special services for his client, without any general employment, he may charge for such services separately, showing the value of each service separately; but if he has been generally employed by the client to take charge of all matters, it would be unreasonable to require him to make a separate charge for each service performed.⁷⁹¹ As has been said: "In the case of an attorney at law, or of an agent, acting for his principal in complicated affairs, it is manifestly inconvenient, if not impracticable, for the agent to make a specific charge for every item of service rendered by him for his principal. Although he may make specific charges for the more prominent and important services rendered by him, yet, if, in the course of his agency he performs other services not included in such charges, it is not unreasonable nor unjust that he should recover for such other services by a charge for commissions, or in some other general form, if his labors result in the collection of money by his principal."⁷⁹²

As a general rule, then, he may recover compensation for any services that it was reasonably necessary for him to render in the course of his employment, including those acts that are reasonably necessary or incidental to the conduct of the matters that are placed in his hands, but excluding services that it was unnecessary or improper for him to render, and without which the matter could have been as well or properly conducted.⁷⁹³ Thus, where a railroad company employed an attorney to assist in

⁷⁹⁰ *Kelley v. Richardson*, 69 Mich. 431, 14 West. R. 416; *Turley v. Richardson*, 69 Mich. 400, 14 West. R. 444.

⁷⁹¹ *Kelley v. Richardson*, 69 Mich. 431, 14 West. R. 416.

⁷⁹² *Pierce v. Parker*, 121 Mass. 403.

⁷⁹³ *Smith v. Alexander*, 80 Ala. 251; *United States Mortg. Co. v. Henderson*, 111 Ind. 24; *Ellwood v. Wilson*, 21 Iowa, 523; *Timlake v. Crosby*, 81 Me. 249; *Crowell v. Truax*, 94 Mich. 585; *Peoples Nat. Bank v. Geisthardt*, 55 Neb. 232 (advising with sheriff as to the proper levying of a writ of attachment); *Stockholm v. Roberts*, 24 Wend. (N. Y.) 109; *In re McLean's Estate*, 5 Kulp (Pa.) 24; *In re Becher's Estate*, 45 Leg. Int. (Pa.) 94; *Gay v. Capers*, 3 B. (S. C.) 283.

l of cases against the company and agreed to give a reasonable fees for his assistance, it does not mean that he is to have fees only for services rendered in the actual trials before the court, but it includes fees for necessary services rendered by him in the action, in a broader sense.⁷⁹⁴ And where services are rendered by an attorney in procuring for a railroad company the right to its tracks along a highway, though not involving any legal question, they are nevertheless within the line of professional employment, which must be compensated accordingly.⁷⁹⁵ So he may charge for consultations which, though necessary, were demanded by the client.⁷⁹⁶

But an attorney cannot recover compensation for services which are against public policy or good morals.⁷⁹⁷ Thus an attorney cannot recover compensation for acting as a lobbyist.⁷⁹⁸

05. How the value of such services is determined.

It is usually a question of fact for the jury to determine, in all the circumstances in the case, what is the reasonable value of an attorney's services;⁷⁹⁹ but where professional services have been rendered under the eye of the court, it may fix the value thereof without hearing any testimony.⁸⁰⁰ Where an attorney's fees have been allotted to him by a judgment of the trial court or of the referee, such judgment will not be disturbed on appeal by the client, in the absence of

⁷⁹⁴ Louisville, N. A. & C. R. Co. v. Reynolds, 118 Ind. 170.

⁷⁹⁵ Breen v. Union R. Co., 9 App. Div. (N. Y.) 122.

⁷⁹⁶ Tinney v. Pierrepont, 18 App. Div. 627, 45 N. Y. Supp. 977.

⁷⁹⁷ Newman v. Davenport, 9 Baxt. (Tenn.) 538; Treat v. Jones, 28 N. 334.

⁷⁹⁸ In re Knapp, 8 Abb. N. C. (N. Y.) 308; Trist v. Child, 21 Wall. (S.) 441.

⁷⁹⁹ Davis v. Webber, 66 Ark. 190, 74 Am. St. Rep. 81; Reves v. Le, 14 Daly (N. Y.) 431; Holm v. Parmele-Eccleston Co., 13 C. (N. Y.) 317; Wilkinson v. Crookston, 75 Minn. 184; Proulx & Stetson & P. Mill Co., 6 Wash. 478; Steel v. Gordon, 14 Wash.

And see Buck v. City of Eureka, 124 Cal. 61; Cullison v. Lind, 108 Iowa, 124.

⁸⁰⁰ Dorsey v. Creditors, 5 Mart. (N. S.; La.) 399; Baldwin's Ex'r Carleton, 15 La. (O. S.) 394; Richards' Succession, 49 La. Ann. 590; Rabasse's Succession, 51 La. Ann. 590.

obvious error of law, or of a serious and important mistake in the consideration of the evidence, or unless he shows excessive charges; it being peculiarly within the power of the trial court to determine such matters.⁸⁰¹

§ 706. **Matters to be considered.**

(a) **In general.**—As has been suggested heretofore there are many circumstances that are to be taken into consideration in determining what is the reasonable value of an attorney's services; and as the circumstances are alike or similar in very few cases no definite rule can be laid down on this question. But it may be stated generally that all facts or circumstances are to be considered as having a tendency to show what compensation the attorney should receive in that particular case. These circumstances may include the amount involved, the skill and experience of the attorney, the nature and difficulty of the case, and many other facts present in the particular case. The most important of these circumstances are probably the ones that have just been enumerated, and which will be considered in this section.

As has been stated in a preceding section, though there is no contract between the attorney and his client may be involved yet the court may look to such contract for the purpose of ascertaining what the parties themselves thought the services were reasonably worth, and, in connection with other evidence, determine what was the reasonable value of the services rendered.⁸⁰² But such contract cannot be taken as a criterion of value for such services.⁸⁰³

⁸⁰¹ *Farmers' Loan & Trust Co. v. McClure*, 78 Fed. 209; *Whitcomb v. New Orleans*, 54 Fed. 614; *Louisville Gas Co. v. Hargis*, 17 L. R. 1190, 33 S. W. 946; *Warren Deposit Bank v. Barclay*, 22 L. R. 1555, 60 S. W. 853; *Richards' Succession*, 49 La. Ann. 1; *Nelson v. Blaisdell*, 23 Or. 507; *Howe v. Kenyon*, 4 Wash. 677. See also, *Walters v. Western & A. R. Co.*, 69 Fed. 706.

⁸⁰² *Davis v. Webber*, 66 Ark. 190, 74 Am. St. Rep. 81; *Shumaker v. Farlow*, 125 Ind. 359; *La Du-King Mfg. Co. v. La Du*, 36 Minn. 1; *Clark v. Gilbert*, 26 N. Y. 279, 84 Am. Dec. 189.

⁸⁰³ *Davis v. Webber*, 66 Ark. 190, 74 Am. St. Rep. 81; *Ellis v. McClelland*, 17 Ala. 209; *Holloway v. Lowe*, 7 Port. (Ala.) 488.

amount involved.—One of the circumstances to be considered in determining the value of an attorney's services is the amount of money or value of the property involved in the case.⁸⁰⁴ "It is very evident that the responsibility, the anxiety, and mental labor, is much greater in a case where the amount in controversy is large than where it is small, although perhaps the same questions might be presented in each case, or the more difficult questions arise in cases where the amount was of but slight consequence. The responsibility, care and mental labor dependent upon the number of hours or days which may be given to the preparation and trial or argument of a case. This responsibility and mental anxiety is not so imaginative and that it should not be considered in arriving at a compensation to be allowed in fixing the value of the services rendered."⁸⁰⁵ And as has been said: "Every gentleman of the bar well knows that there cannot be any rule in the nature of a horizontal tariff for all cases. Where the parties are poor and the matter in contest is small, the counsel receive but very inadequate compensation for the exertion of body and mind; and for myself I know of some of the most severe labor of my professional

Louis, I. M. & S. R. Co. v. Clark, 51 Fed. 483; *National Bk. & Loan Ass'n v. Fifer*, 71 Ill. App. 295; *McMannomy v. D. & V. R. Co.*, 167 Ill. 497; *Haish v. Payson*, 107 Ill. 365; *Goddard v. Goddard*, 17 Ill. App. 385; *Reisterer v. Carpenter*, 124 Ill. 515; *Smith v. Chicago & N. W. R. Co.*, 60 Iowa, 515; *Ottawa v. Parkinson*, 14 Kan. 159; *Fox v. Willis' Ex'r*, 24 Ky. 72 S. W. 330; *Billington v. Poitevent & F. Lumber Co.*, 1397; *Interdiction of Leech*, 45 La. Ann. 194; *Babbitt v. Quint*, 331, 16 Am. St. Rep. 585; *Quint v. Opher Silver*, 4 Nev. 304; *Schlesinger v. Dunne*, 36 Misc. (N. Y.) 529; *Bond St. Sav. Bank*, 10 Abb. N. C. (N. Y.) 15; *Garfield v. Barb.* (N. Y.) 464; *Holmes v. Holland*, 29 Wkly. Law Bul. 115; *Kittredge v. Armstrong*, 28 Wkly. Law Bul. (Ohio) 543; *Bank v. Combs*, 7 Pa. 543; *Gorman v. Banigan*, 22 Tenn. Ch. App. 52 S. W. 1007; *Eakin v. Hotel Co.* (Tenn. Ch. App.) 54 S. W. 87; *Wright v. Knox & Stock Co.* (Tenn. Ch. App.) 59 S. W. 677; *International N. R. Co. v. Clark*, 81 Tex. 48; *Remington v. Eastern*, 154 Wis. 154; *Boardman*, 37 Mich. 17.

life, I have been the least well paid. In other cases the parties are wealthy, and the sum in controversy they will receive a tenfold greater compensation for a tithe of the same labor. In some cases the whole dispute would be poor compensation. In others, cent. of it will be very liberal. Hence, in all cases, sional compensation is gauged, not so much by the of the labor, as by the amount in controversy, the al the party, and the result of the effort."⁸⁰⁶ Thus it l held that five thousand dollars was a reasonable at fee for conducting successfully a suit involving one l thousand dollars, in the appellate court;⁸⁰⁷ or wher thousand dollars was saved after long litigation.⁸⁰⁸ the attorney represents but part of the interests inv a suit his fees should be fixed with reference to the represented by him, and not with reference to th amount involved.⁸⁰⁹

But it is held that the wealth of the client cannot sidered in determining the fees of the attorney.⁸¹⁰

(c) **Skill and experience of attorney.**—The skill, ence, character, and standing of an attorney are also tant factors in determining the value of his service case,⁸¹¹ for it is evident that an attorney especially

⁸⁰⁶ Mr. Justice Grier, in *Lombard v. Bayard*, 1 Wall. Jr. Fed. Cas. No. 8,469.

⁸⁰⁷ *Sanders v. Seelye*, 128 Ill. 631.

⁸⁰⁸ *In re Treadwell*, 9 Sawy. 29, 23 Fed. 442.

⁸⁰⁹ *Hines v. Brunswick & A. R. Co.*, 50 Ga. 563.

⁸¹⁰ *Stevens v. Ellsworth*, 95 Iowa, 231; *Hamman v. Williams*, 507; *International & G. N. R. Co. v. Clark*, 81 Tex. 48; *R. Harvey*, 5 Conn. 335; *Daly v. Hines*, 55 Ga. 470. But see *Succession*, 18 La. Ann. 42; *Braux v. Francke*, 30 La. Ann. 3. It is held that in fixing the compensation for the professional services of a lawyer in any particular case, there are two conditions which will determine the judgment of this court. One is the amount and character of the work done, and the other is the ability of the debtor to pay. See *Ward v. Kohn*, 58 Fed. 462, where it is held that such evidence may be admitted, not to enhance the compensation above a reasonable compensation, but to determine whether the client is able to pay a fair and just compensation for the services rendered.

⁸¹¹ *Stanton v. Embrey*, 93 U. S. 557; *Davis v. Webber*, 66

enced in the cases which he undertakes, is entitled a larger fee for his services than one who is, as yet, and inexperienced. "In estimating the value of al services, there is a personal element which e applicant, the court, nor his brother lawyers who lled on as witnesses, can or ought to ignore. The ices rendered by a young lawyer with the ink on e scarcely dry, and by a veteran of forty years' e, who may have occupied high judicial position, erly enough, be measured by each by a very differ- rd, and will entitle each to very different compen-

Thus, where there is a dispute as to the value onal services, the attorney may show the character nt of his professional business as tending to show osional standing and thus sustain the propriety of s.⁸¹³ But in an action on a contract for profes- ices, the client cannot show, in order to sustain his the contract, that plaintiff was a lawyer of limited nd experience, when there is nothing to indicate ne time the contract was entered into, the client hing about plaintiff's qualifications.⁸¹⁴

Nature and difficulty of the case.—So the nature and of the case, the time consumed, the amount and of the services, and the responsibility imposed upon ey, should be considered in determining the value orney's services;⁸¹⁵ as it is but right and proper

Rep. 81; Phelps v. Hunt, 40 Conn. 97; Campbell v. God- l. App. 385; Levinson v. Sands, 74 Ill. App. 273; Clark h, 104 Iowa, 443; Caverly v. McOwen, 123 Mass. 574; v. Boardman, 37 Mich. 14; Chamberlain v. Rodgers, 79 Lurgerhausen v. Crittenden, 103 Mich. 173; People v. v. Bank, 10 Abb. N. C. (N. Y.) 15; Schlesinger v. Dunne, N. Y.) 529; Kittredge v. Armstrong, 28 Wkly. Law Bul. ; Holmes v. Holland, 29 Wkly. Law Bul. (Ohio) 115; Banigan, 22 R. I. 22; Wright v. Knoxville Livery & Stock Ch. App.) 59 S. W. 677; International & G. N. R. Co. Tex. 48; Vilas v. Downer, 21 Vt. 419. ng v. Scales, 1 Tenn. Ch. 620.

v. Hunt, 40 Conn. 97.

speare v. Baughman, 113 Mich. 551.

v. Claffin, 86 Fed. 964; Sanders v. Graves, 105 Fed. 849;

that an attorney should receive more for his service in a case requiring a longer time, more labor and greater expense than one not requiring so much time, labor and expense, all else being equal. Thus the attorney may be allowed for traveling expenses and for the entire time consumed in the case, including that occupied in traveling.⁸¹⁶ In cases involving litigation the nature and importance of the litigation are to be considered.⁸¹⁷

— **Result.** So the success or result attained by reason of the attorney's services is an important element in determining the value of the latter.⁸¹⁸ But the benefit that v

Davis v. Webber, 66 Ark. 190, 74 Am. St. Rep. 81; *McManis v. Chicago, D. & V. R. Co.*, 167 Ill. 497; *Farley v. Geisheker*, 453; *Stevens v. Ellsworth*, 95 Iowa, 231; *Clark v. Ellsworth*, 104 Iowa, 443; *Noftzger v. Moffett*, 63 Kan. 354; *Breaux v. Frick*, 4 La. Ann. 336; *Lee's Succession*, 4 La. Ann. 578; *Billington v. Invent & F. Lumber Co.*, 52 La. Ann. 1397; *Cooke v. Plait*, 37 Mass. 374; *Eggleston v. Boardman*, 37 Mich. 14; *Chamberlain v. Rodgers*, 79 Mich. 219; *Selover v. Bryant*, 54 Minn. 434, 40 Am. St. Rep. 349; *City of Holly Springs v. Manning*, 55 Miss. 380; *People v. Harned* (N. J. Eq.) 13 Atl. 236; *People v. Bond* St. Sa. 10 Abb. N. C. (N. Y.) 15; *Schlesinger v. Dunne*, 36 Misc. 529; *Kittredge v. Armstrong*, 28 Wkly. Law Bul. (Ohio) 249; *Vilas v. Holland*, 29 Wkly. Law Bul. (Ohio) 115; *Gorman v. Bar*, 1 R. I. 22; *Wright v. Knoxville Livery & Stock Co.* (Tenn. C. 59 S. W. 677; *Vinson v. Cantrell* (Tenn. Ch. App.) 56 S. W. 919; *Taylor v. Badoux* (Tenn. Ch. App.) 58 S. W. 919; *International & G. N. R. Co. v. Clark*, 81 Tex. 48.

⁸¹⁶ *Quint v. Opher Silver Min. Co.*, 4 Nev. 304.

⁸¹⁷ *Campbell v. Goddard*, 17 Ill. App. 385; *Ottawa Univ. v. Parkinson*, 14 Kan. 159; *Selover v. Bryant*, 54 Minn. 434, 40 Am. St. Rep. 349; *City of Holly Springs v. Manning*, 55 Miss. 380; *Land v. Lillenthal*, 53 N. Y. 438; *Kittredge v. Armstrong*, 28 Wkly. Law Bul. (Ohio) 249; *International & G. N. R. Co. v. Clark*, 81 Tex. 48; *Vilas v. Downer*, 21 Vt. 419.

⁸¹⁸ *Fillmore v. Wells*, 10 Colo. 228; *McMannomy v. Chicago, D. & V. R. Co.*, 167 Ill. 497; *Clark v. Ellsworth*, 104 Iowa, 443; *Stevens v. Ellsworth*, 95 Iowa, 231; *Berry v. Davis*, 34 Iowa, 594; *Noftzger v. Moffett*, 63 Kan. 354; *Germania Safety Vault & T. Co.'s v. Hargis*, 23 Ky. L. R. 874, 64 S. W. 516; *Louisville Gas Co. v. Rutland*, 17 Ky. L. R. 1190, 33 S. W. 946; *Rutland v. Cobb*, 32 Ky. L. R. 857; *Eggleston v. Boardman*, 37 Mich. 14; *Selover v. Bryant*, 54 Minn. 434, 40 Am. St. Rep. 349; *Randall v. Packard*, 142 N. H. 142.

ely accrue to the client is not a proper matter to con-
sider.⁸¹⁹

e) **Other evidence admissible.**—And so in determining the value of an attorney's services, evidence may be introduced to show the charges usually made by other attorneys, in the same vicinity, in cases of the same character, for similar services.⁸²⁰ Also the opinions of attorneys in good standing and active practice at the same bar may be admitted, as to what the services are reasonably worth under the circumstances,⁸²¹ but a witness cannot testify as to the value of legal services unless shown to be an attorney or in some way qualified to speak on the subject.⁸²² And where an attorney living in a different part of the state is offered as an ex-

lesinger v. Dunne, 36 Misc. (N. Y.) 529; Kittredge v. Armstrong, 29 Wkly. Law Bul. (Ohio) 249; Holmes v. Holland, 29 Wkly. Law Bul. (Ohio) 115; Gorman v. Banigan, 22 R. I. 22; Vinson v. Cantelero, (Tenn. Ch. App.) 56 S. W. 1034.

Haish v. Payson, 107 Ill. 365; Stevens v. Ellsworth, 95 Iowa,

Stanton v. Embrey, 93 U. S. 557; Knight v. Russ, 77 Cal. 410; Gham v. Spruill, 97 Ill. App. 374; Louisville, N. A. & C. R. Co. v. Wallace, 136 Ill. 87; Haish v. Payson, 107 Ill. 365; Reynolds v. McManis, 63 Ill. 46; Nathan v. Brand, 167 Ill. 607; Cullom v. Mock, 21 Ill. Ann. 687; Jackson's Succession, 30 La. Ann. 463; Bodfish v. Kelley, 23 Me. 90, 39 Am. Dec. 611; Calvert v. Coxe, 1 Gill (Md.) 96; Kelley v. Richardson, 69 Mich. 430; Allison v. Scheeper, 9 Daly (N. Y.) 365; Thompson v. Boyle, 85 Pa. 477; Vilas v. Downer, 21 Vt.

Greiff v. Miller, 87 Fed. 33; Sanders v. Graves, 105 Fed. 849; T. v. Vidal, 6 Cal. 56; Davis v. Webber, 66 Ark. 190, 74 Am. St. Rep. 81; Bachman v. O'Reilly, 14 Colo. 433; Hazeltine v. Brockway, 29 Colo. 291; Louisville, N. A. & C. R. Co. v. Wallace, 136 Ill. 87; Haish v. Payson, 107 Ill. 365; McMannomy v. Chicago, D. & V. R. Co., 167 Ill. 497; Covey v. Campbell, 52 Ind. 157; Blizzard v. Appleton, 61 Ind. 368; Clark v. Ellsworth, 104 Iowa, 442; Jackson's Succession, 30 La. Ann. 463; Bodfish v. Fox, 23 Me. 90, 39 Am. Dec. 611; Kelley v. Richardson, 69 Mich. 430; Allis v. Day, 14 Minn. 516; Field v. Kirk, 65 Barb. (N. Y.) 464; Williams v. Brown, 28 Ohio St. 547; Thompson v. Boyle, 85 Pa. 477; Taylor v. Badoux (Tenn. Ch. App.) 58 S. W. 919; Pickett v. Gore (Tenn. Ch. App.) 58 S. W. 919; Remington v. Eastern R. Co., 109 Wis. 154.

Fry v. Estes, 52 Mo. App. 1; Clark v. Ellsworth, 104 Iowa, 442.

see Howell v. Smith, 108 Mich. 350.

pert in a particular case, it must be shown that he is familiar with the rates charged in the locality where the services were rendered.⁸²³ Where attorneys residing in one state are employed to go and render professional services in another state the compensation to which they are entitled will be governed by the value of such services in their home state, rather than of that in which they are performed.⁸²⁴ The opinion of the attorney of the defendant in a suit is competent evidence to show that the plaintiff therein had no case, where there is a dispute between the attorney and his client as to the value of the former's services in a suit in which the client was plaintiff, and which was settled without a trial.⁸²⁵ The testimony of the attorney himself may be admitted to show that he was employed in the case and that his services were worth the amount charged.⁸²⁶

But while opinions of professional witnesses may be received in evidence and are entitled to great weight in determining the value of an attorney's services, such opinions are only to be taken in connection with other evidence introduced in the case, and all must be submitted to the court or jury from which it or they must determine the value.⁸²⁷ And

⁸²³ *Stevens v. Ellsworth*, 95 Iowa, 231.

⁸²⁴ *Stanberry v. Dickerson*, 35 Iowa, 493.

⁸²⁵ *Aldrich v. Brown*, 103 Mass. 527.

⁸²⁶ *Schlicht v. Stivers*, 61 Iowa, 746; *Babbitt v. Bumpus*, 73 Mo. 331, 16 Am. St. Rep. 585; *Humes v. Decatur Land Imp. & F.*, 98 Ala. 461; *Chamberlain v. Rodgers*, 79 Mich. 219; *Germania Sav. Vault & T. Co.'s Assignee v. Hargis*, 23 Ky. L. R. 874, 64 S. W.

⁸²⁷ *Sanders v. Graves*, 105 Fed. 849; *Head v. Hargrave*, 105 U. S. 45; *Moore v. Watts*, 81 Ala. 261; *In re Dorland*, 63 Cal. 281; *Berman v. O'Reilly*, 14 Colo. 433; *Willard v. Williams*, 10 Colo. 140; *Bourke v. Whiting*, 19 Colo. 1; *Dorsey v. Corn*, 2 Ill. App. 8; *McMannomy v. Chicago, D. & V. R. Co.*, 167 Ill. 497; *William Boyd*, 75 Ind. 286; *Blizzard v. Applegate*, 61 Ind. 368; *Arndt v. I.*, 82 Iowa, 499; *Bentley v. Brown*, 37 Kan. 14; *Louisville Co. v. Hargis*, 17 Ky. L. R. 1190, 33 S. W. 946; *Jackson's Succession*, 30 La. Ann. 463; *Auld's Succession*, 45 La. Ann. 248; *Randolph Carroll*, 27 La. Ann. 467; *Cullom v. Mock*, 21 La. Ann. 687; *T. bull v. Richardson*, 69 Mich. 400; *Olson v. Gjertsen*, 42 Minn. 4; *Cosgrove v. Leonard*, 134 Mo. 419; *Rose v. Spies*, 44 Mo. 20; *R. v. Hyde*, 14 Daly (N. Y.) 431; *Randall v. Packard*, 142 N. Y.

ould be governed by the evidence in the case, and not preconceived notions of the value of such services.⁸²⁸ If an action is brought for compensation for services rendered in taking depositions, a copy containing all the questions and answers may be admitted to show whether the plaintiff performed the services with proper care, where it is shown by a witness, who was present, to be a fact.⁸²⁹ So where the defendant admitted to a third party that he was indebted to the plaintiff in the amount of the value of services rendered, it is proof of the plaintiff's right to recover.⁸³⁰ The records and pleadings in a case may be admitted towards proving his employment and the value of his services.⁸³¹

Where an attorney seeks to recover for professional services under a contract, the services contemplated rather than the services actually performed should be considered, and the plaintiff cannot show that the labor performed was light in comparison with the alleged contract price.⁸³²

Evidence not admissible.—But the attorney may not introduce evidence of what he received for services in another suit, or of what another attorney received in the same or another suit, to show what his services are reasonably worth in the present suit,⁸³³ unless they have been engaged to perform similar services, have the same experience and skill, and performed the same amount of labor in each case.⁸³⁴

W. Holland, 29 Wkly. Law Bul. (Ohio) 115; *Kittredge v.*

W. Holland, 28 Wkly. Law Bul. (Ohio) 249.

W. Holland v. Dailey, 107 Ind. 117.

W. Holland v. Hill, 31 Mo. App. 101.

W. Holland v. Cain, 50 Ala. 408.

W. Holland v. Breen, 7 Ind. App. 557.

W. Holland v. Baughman, 113 Mich. 551.

W. Holland v. Vidal, 6 Cal. 56; *Robbins v. Harvey*, 5 Conn. 335; *Ottawa University v. Parkinson*, 14 Kan. 159; *Ottawa University v.*

W. Holland v. Calvert, 14 Kan. 164; *Calvert v. Coxe*, 1 Gill (Md.) 96; *Babbitt v.*

W. Holland v. 73 Mich. 331, 16 Am. St. Rep. 585; *Allison v. Scheeper*, 9

W. Holland v. (Y.) 365; *Playford v. Hutchinson*, 135 Pa. 426; *Taylor v.*

W. Holland v. (Tenn. Ch. App.) 58 S. W. 919; *Kelly v. Houghton*, 59 Wis.

W. Holland v. Compare Cunning v. Kemp, 22 Wis. 509.

W. Holland v. Compare Cunning v. Kemp, 22 Wis. 509; *Ottawa Uni-*

W. Holland v. Compare Cunning v. Kemp, 22 Wis. 509; *Ottawa Uni-*

W. Holland v. Compare Cunning v. Kemp, 22 Wis. 509; *Ottawa Uni-*

W. Holland v. Compare Cunning v. Kemp, 22 Wis. 509; *Ottawa Uni-*

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W. Holland v. Compare Cunning v. Kemp, 22 Wis. 509; *Ottawa Uni-*

W. Holland v. Compare Cunning v. Kemp, 22 Wis. 509; *Ottawa Uni-*

W. Holland v. Compare Cunning v. Kemp, 22 Wis. 509; *Ottawa Uni-*

Where an attorney conducts a suit for a person he is entitled to a reasonable compensation for his services, without regard to what he received from another person for conducting a suit on a similar state of facts, the latter suit having been stayed to await the determination of the former suit.⁸³⁵ Where an attorney argues a case at one term for an agreed sum and at a subsequent term argues the same case and charges more for it, it is a question of fact whether he is entitled to the same or other compensation.⁸³⁶

It is improper to admit proof that the services of a good attorney at the place where the plaintiff attorney was were reasonably worth so much per month. If evidence of this nature is sought to be introduced it should be done by calling witnesses' attention to the particular services rendered, and let him give his opinion thereon.⁸³⁷ Nor may evidence that other attorneys were employed in the same case in which the plaintiff's attorney was employed be introduced, unless it is shown that they made his labors lighter in some respect.⁸³⁸ Nor may evidence that the opposite side attempted to employ him after his client had done so be admitted; he can show, as evidence of a reasonable fee, what the opposite side offered to give him.⁸³⁹ So evidence as to the amount of business the attorney had on hand when the services were rendered is irrelevant.⁸⁴⁰ Nor are rules, prescribed by the local bar, setting forth a list of rates to be charged, binding upon a client unless the circumstances are such as to show that the client presumably had knowledge of such rules and employed the attorney, expecting to pay according to them.⁸⁴¹

⁸³⁵ *Bruce v. Dickey*, 116 Ill. 527. Compare *Cunning v. Kemp*, 101 Wis. 509.

⁸³⁶ *Strong v. McConnel*, 5 Vt. 338.

⁸³⁷ *Southgate v. Atlantic & P. R. Co.*, 61 Mo. 89.

⁸³⁸ *Hutchinson v. Dunham*, 41 Ill. App. 107; *In re Simpson's Estate*, 53 Hun (N. Y.) 629; *Wright v. Gillespie*, 43 Mo. App. 244.

⁸³⁹ *Steenerson v. Waterbury*, 52 Minn. 211.

⁸⁴⁰ *Gaither v. Dougherty*, 18 Ky. L. R. 709, 38 S. W. 2.

⁸⁴¹ *Boylan v. Holt*, 45 Miss. 277; *Planters' Bank v. Hornberg*, 100 Cold. (Tenn.) 531; *Gaither v. Dougherty*, 18 Ky. L. R. 709, 38 S. W. 2.

707. Right of attorney to claim more than originally demanded.

Where an attorney has rendered an account to his client, the fact that he has therein demanded a certain amount for services rendered, does not estop him from subsequently claiming a larger amount for such services, if the client does not pay such account when presented, but chooses to dispute it.⁸⁴² Some decisions, however, hold that, unless the demand was made in the nature of a compromise or by mistake, the attorney cannot recover more than he originally demanded, nor prove that his services were worth more than such demand.⁸⁴³ But of course if the amount to be received has been fixed by contract, or if there has been a final settlement, the attorney cannot prove that his services were worth more and thereby receive a greater amount.⁸⁴⁴

708. Defenses of client to action for compensation.

(a) **Bad faith or negligence of the attorney.**—If an attorney has abused the confidence and trust which were reposed in him, or has been so negligent or ignorant in the performance of his duties that his services have been of little if any value to his client, the latter may set these facts up as a defense, either in mitigation of or as a bar to the amount claimed by the attorney as compensation,⁸⁴⁵ whether the

⁸⁴² *Miller v. Beal*, 26 Ind. 234; *Romeyn v. Campau*, 17 Mich. 327; *Allis v. Day*, 14 Minn. 516; *Wilson v. Minneapolis & N. W. R. Co.*, 31 Minn. 481; *Williams v. Glenny*, 16 N. Y. 389; *Bradt v. Scott*, 63 Hun (N. Y.) 632; *Hard v. Burton*, 62 Vt. 314.

⁸⁴³ *Flower's Succession*, 3 La. Ann. 292; *Ingersoll v. Morse*, 33 Miss. 667; *Pickett v. Gore* (Tenn. Ch. App.) 58 S. W. 402.

⁸⁴⁴ *Phenix Ins. Co. v. McKenzie*, 38 Ill. App. 630; *Coopwood v. Wallace*, 12 Ala. 790.

⁸⁴⁵ *Pearson v. Darrington*, 32 Ala. 227; *Hinckley v. Krug* (Cal.) 4 Pac. 118; *Bridges v. Paige*, 13 Cal. 640; *Brackett v. Norton*, 4 Conn. 517, 10 Am. Dec. 179; *Larey v. Baker*, 86 Ga. 468; *McArthur v. Fry*, 10 Kan. 233; *Thomas v. Mahone*, 9 Bush (Ky.) 111; *O'Halloran v. Marshall*, 8 Ind. App. 394; *Lindsay v. Carpenter*, 90 Iowa, 229; *Timberlake v. Crosby*, 81 Me. 249; *Caverly v. McOwen*, 126 Mass. 222; *Davis v. Swedish-American Nat. Bank*, 78 Minn. 408, 79 Am. St. Rep. 400; *Carter v. Tallcot*, 36 Hun (N. Y.) 393; *Chatfield v. Simonson*, 92 N. Y. 209; *Hopping v. Quinn*, 12 Wend. (N. Y.)

amount had been fixed by express contract or not. That where an attorney acted in excess of his authority and adversely to his client's interests, it is a defense to his claim for compensation.⁸⁴⁶ Likewise is a continuance of a case contrary to his client's instructions whereby the client becomes liable for costs.⁸⁴⁷ Nor can an attorney recover compensation where he is the client's only attorney and fails to bring a suit for which he is retained.⁸⁴⁸ It would be otherwise, however, if he was merely an assistant, and stood ready to perform his part of the contract, but the suit was never instituted.⁸⁴⁹

But the client must show that the damage suffered by him resulted from the attorney's negligence, or bad faith, in order that he may put up such a defense.⁸⁵⁰ The mere fact that the attorney failed to win a case, or that his services were of no benefit to the client, does not in general affect the attorney's right to compensation, unless the failure was due to the attorney's negligence or incompetence.⁸⁵¹ The failure of an attorney to reserve a bill of exceptions from an erroneous ruling of the circuit court, as to the sufficiency of a subsequent promise to revive a debt barred by the statute of limitations, is not such negligence as would prevent him from recovering his fee from his client;⁸⁵² nor is his failure to be present at the final trial of the suit, where it is not shown that he was employed generally to represent his client's interests in the suit.⁸⁵³

517; *Nixon v. Phelps*, 29 Vt. 198; *Maynard v. Briggs*, 26 Vt. 18; *Armin v. Loomis*, 82 Wis. 86.

⁸⁴⁶ *Chatfield v. Simonson*, 92 N. Y. 209.

⁸⁴⁷ *O'Halloran v. Marshall*, 8 Ind. App. 394.

⁸⁴⁸ *Thorn v. Beard*, 135 N. Y. 643.

⁸⁴⁹ *Carter v. Baldwin*, 95 Cal. 475.

⁸⁵⁰ *Hinckley v. Krug* (Cal.) 34 Pac. 118; *Deering v. Schreyer*, 100 Misc. (N. Y.) 237.

⁸⁵¹ *Foltz v. Cogswell*, 86 Cal. 542; *Singer v. Steele*, 24 Ill. App. 385; *Brackett v. Sears*, 15 Mich. 244; *Bowman v. Tallman*, 25 N. Y. Sup. Ct. 385; *Bills v. Polk*, 4 Lea (Tenn.) 494; *Murphey v. Shepard*, 60 Wis. 412. See ante, § 655 et seq.

⁸⁵² *Pearson v. Darrington*, 32 Ala. 229.

⁸⁵³ *Pearson v. Darrington*, 32 Ala. 227; *Douglass v. Eason*, 36 Ala. 687.

The fact that the attorney occupied inconsistent relations with other parties cannot be pleaded as a defense to the attorney's action to enforce payment of his fees, where the client knew of such inconsistent relation at the time he employed him, or consented thereto.⁸⁵⁴

(b) **Failure to pay over money collected.**—If an attorney collects money for his client and without a legal reason refuses or fails to pay it over within a reasonable time, or on demand, and the client is compelled to resort to legal proceedings and employ other counsel to obtain it, the attorney that collected the money thereby loses his right to compensation for such collection.⁸⁵⁵ If, however, there is some legal reason for the attorney's thus withholding the money collected, as where he retains it in payment for fees due him, the client can recover only the surplus after deducting such fees.⁸⁵⁶

(c) **Attorney's success as a defense.**—An attorney, when retained by a client to conduct a case for him, does not immediately contract that he will be successful at all events. He contracts to give to the case due skill, care and diligence; and if he has faithfully and intelligently performed his services, and has not expressly contracted not to charge a fee unless successful, the fact that he was not successful in bringing the case to the desired conclusion will not deprive him of his compensation for services rendered.⁸⁵⁷

(d) **When client may plead the statute of limitations.**—In this case as in all others in which the statute of limitations may be pleaded, the statute begins to run from the time the

⁸⁵⁴ Mealer v. Gilbert, 22 Ky. L. R. 1523, 60 S. W. 8; Brodie v. Parsons, 23 Ky. L. R. 831, 64 S. W. 426.

⁸⁵⁵ Trapnall v. Byrd, 22 Ark. 10; Gray v. Conyers, 70 Ga. 349; Mcowell v. Baker, 29 Ind. 481; Large v. Coyle (Pa.) 12 Atl. 343; Asher v. Knox, 13 Pa. 622, 53 Am. Dec. 503; Wills v. Kane, 2 Grant as. (Pa.) 60; Bredin v. Kingland, 4 Watts (Pa.) 420.

⁸⁵⁶ Soper v. Manning, 147 Mass. 126; Burns v. Allen, 15 R. I. 32, Am. St. Rep. 844; Foster v. Jackson, 8 Baxt. (Tenn.) 433.

⁸⁵⁷ French v. Cunningham, 149 Ind. 632; Fenner v. McCan's Succession, 49 La. Ann. 600; Brackett v. Sears, 15 Mich. 244; Moran v. L'Etoile, 118 Mich. 159; Harriman v. Baird, 158 N. Y. 691; Bush v. Cavanaugh, 2 Pa. 187; Bills v. Polk, 4 Lea (Tenn.) 494.

attorney's cause of action accrues, which is at the time attorney has completed his performance or the contingency has happened, and he is entitled to sue, if necessary, for compensation; and as has been seen, where an attorney employed generally to conduct a case, his contract is an entire one, continuing until final termination of the suit, entry of judgment, unless previously terminated by the client. Therefore the statute of limitations would begin to run against the attorney from the time judgment was entered, if the suit or service was otherwise terminated, and the client could plead such statute in bar of the attorney's claim, if the latter delayed enforcing the same until after the limitation prescribed by statute had expired.⁸⁵⁸ But if, before termination of the suit, the attorney is discharged by the client, or if the attorney abandons the case, for good cause, before judgment has been entered, a present right of action for part services would arise, and the statute would begin to run from that time.⁸⁵⁹ If, however, the attorney had been generally retained in the case, but had been employed only for a particular purpose, as assisting in the examination of witnesses, preparing a declaration, or arguing a cause, the statute would begin to run from the time he had completed his particular duty.

Where the parties have made a contract by which the attorney is to be paid at a specified time, and he has been discharged, or abandons, for good cause, before that time

⁸⁵⁸ *Whitehead v. Lord*, 7 Exch. 691; *Harris v. Osbourn*, 2 Cro. & M. 629; *Martindale v. Falkner*, 2 C. B. 706; *Phelps v. Patter-*
25 Ark. 185; *Fenno v. English*, 22 Ark. 170; *Hancock v. Pio-P*
47 Cal. 161; *Meyer v. McCumber*, 75 Ill. App. 119; *Walker v. G*
rich, 16 Ill. 341; *Ennis v. Pullman Palace Car Co.*, 165 Ill. 1
Elliot v. Lawton, 7 Allen (Mass.) 274, 83 Am. Dec. 683; *John*
v. Pyles, 11 Smedes & M. (Miss.) 189; *Bathgate v. Haskin*, 59 N.
533; *Bruyn v. Comstock*, 56 Barb. (N. Y.) 9; *Reavey v. Clark*
Hun (N. Y.) 641; *Mosgrove v. Golden*, 101 Pa. 605; *Campbel*
Maple's Adm'r, 105 Pa. 304; *Jones v. Lewis*, 11 Tex. 359; *Starl*
Hart, 22 Tex. Civ. App. 543; *Davis v. Smith*, 48 Vt. 52; *Nobl*
Bellows, 53 Vt. 527. But see *Holloway v. Appelget*, 55 N. J.
583.

⁸⁵⁹ *Elliot v. Lawton*, 7 Allen (Mass.) 274, 83 Am. Dec. 683; *Ad*
v. Fort Plain Bank, 36 N. Y. 255.

statute begins to run only from the time he would have
 right to his compensation, which is the time set forth in
 contract. Thus where he has agreed to render his serv-
 for which he is to be paid a certain sum when judg-
 t is entered, or a compromise obtained in favor of his
 at, and he is wrongfully discharged before the action is
 inated, the statute of limitation does not commence to
 against the claim for compensation until judgment is
 vered,⁸⁶⁰ or a compromise made.⁸⁶¹ So if he was to be
 when judgment was collected, the statute would begin
 run from that time.⁸⁶²

**90. Effect of premature termination of employment on
 attorney's right to compensation—In general.**

As a general rule an attorney's right to compensation does
 accrue until he has completely performed the services con-
 tracted for,⁸⁶³ or until some contingency, upon which his
 compensation depended, has happened. But it often hap-
 pens that an attorney's employment is brought to an end
 by one cause or another before the attorney has fully per-
 formed the stipulated service or the contingency has hap-
 pened. The question then arises as to what compensation,
 if any, the attorney is entitled to for services already per-
 formed. The solution of this question must necessarily de-
 pend upon the nature of the contract of employment, and
 upon the means or causes by which the employment has
 been prematurely terminated. In some cases it may be
 that he can recover the full compensation agreed upon, in
 others the reasonable value of services rendered, and in oth-
 ers it may be that he can recover nothing. It will be shown
 in the following sections how this right is affected by a
 premature termination of the relation in the most usual
 cases.

⁸⁶⁰ *Bartlett v. Odd Fellows' Sav. Bank*, 79 Cal. 218, 12 Am. St.
 L. 139.

⁸⁶¹ *Bartlett v. Odd Fellows' Sav. Bank*, 79 Cal. 218, 12 Am. St.
 L. 139.

⁸⁶² *Foster v. Jack*, 4 Watts (Pa.) 334; *Morgan v. Brown*, 12 La.
 L. 159.

⁸⁶³ *Nichols v. Scott*, 12 Vt. 47; *Scobey v. Ross*, 5 Ind. 445. See
 also, § 691.

§ 710. Where ended by client's own act.

As we shall see hereafter, where an attorney is employed by a client, he cannot abandon or terminate such employment without a legal reason or excuse. So the client cannot discharge him or otherwise terminate the relation without some valid excuse or reason therefor. If, then, where an attorney has been employed generally by his client, he terminates the relation by discharging him, or otherwise prevents him from fulfilling his contract, without any valid reason or excuse, the attorney may recover, on a quantum meruit, compensation for the services he had rendered up to the time of discharge.⁸⁶⁴ But if the amount of compensation had been expressly agreed upon, and the attorney was ready and willing on his part to fulfill his contract, he may recover that amount of compensation stipulated for.⁸⁶⁵ Or if the attorney is employed for a definite time, and he is discharged without cause before that time has expired, the client will be liable to him for whatever loss he has sustained by reason of the discharge.⁸⁶⁶ If, however, the parties had entered into a contract for a contingent fee, in case of success of the attorney in prosecuting a suit, the measure of damages would be a reasonable compensation for services already rendered.

⁸⁶⁴ *Moore v. Robinson*, 92 Ill. 491; *Scobey v. Ross*, 5 Ill. 111; *French v. Cunningham*, 149 Ind. 632; *Henry v. Vance*, 111 Ind. 111; *Western Union Tel. Co. v. Semmes*, 73 Md. 9; *Duke v. H. H. Moore*, Mo. App. 296; *Quint v. Opher Silver Min. Co.*, 4 Nev. 304; *v. Berger*, 93 N. Y. 524, 45 Am. Rep. 263; *Ogden v. Devlin*, 100 N. Y. 100, 38 Am. Rep. 100; *Super. Ct.* 631; *Copp v. Colonial Coal & Iron Co.*, 33 Misc. 773; *In re Mitchell*, 57 App. Div. (N. Y.) 22; *Com. v. T. T. Pa. Super. Ct.* 547.

⁸⁶⁵ *Brodie v. Watkins*, 33 Ark. 545, 34 Am. Rep. 49; *Trescony*, 76 Cal. 621; *Bartlett v. Odd Fellows' Sav. Bank*, 218, 12 Am. St. Rep. 139; *Town of Mt. Vernon v. Patton*, 94 Mo. 159; *Moyer v. Cantieny*, 41 Minn. 242; *Reynolds v. Clark County*, 100 Mo. 680; *Kersey v. Garton*, 77 Mo. 645; *McElhinney v. Kline*, Mo. App. 94; *Grant v. Langley*, 34 Misc. 776; *Bright v. Taylor*, 100 (Tenn.) 159; *McClain v. Williams*, 8 Yerg. (Tenn.) 230; *Chism*, 5 Sneed (Tenn.) 116; *Myers v. Crockett*, 14 Tex. 257; *v. Cunningham*, 25 Tex. 25.

⁸⁶⁶ *Hunt v. Test*, 8 Ala. 713; *Baldwin v. Bennett*, 4 Cal. 31; *Kersey v. Garton*, 77 Mo. 645; *McElhinney v. Kline*, 6 Mo. 111; *Myers v. Crockett*, 14 Tex. 257.

not the amount of the contingent fee agreed upon;⁸⁶⁷ though if it were a case depending upon some other contingency, which had already happened at the time of the termination by the client, the attorney could recover the full amount of such fee.⁸⁶⁸

But if the client discharges an attorney employed upon a specific contract, for a good and justifiable cause, the weight of authority holds that the client is not thereby under any liability to the attorney for fees.⁸⁶⁹

— **What sufficient cause for discharge.** There can be no definite rule as to what will be a sufficient cause to justify discharge of an attorney who has been employed for a specified time, just as there cannot be a definite rule as to what will be a sufficient cause for an attorney's abandonment. But there would seem to be no doubt on the subject if the attorney had been barred from practicing, for then he could not perform his duty to his client, by order of the court; or if he should refuse to regard or obey any special instructions given to him by his client; or if he should prove unfaithful to his client's interests, or to the confidence reposed in him by the client. In either of these events the client would certainly have a sufficient cause for discharging his attorney. So if the attorney does not possess that degree of knowledge and skill which he impliedly represents himself to possess when he undertakes his client's business, and is negligent and unskillful in the performance of his duty, he may be discharged.⁸⁷⁰

Western Union Tel. Co. v. Semmes, 73 Md. 9; *Majors v. Hickman*, 2 Bibb (Ky.) 217; *Henry v. Vance*, 111 Ky. 72; *Badger v. Badger*, 8 Misc. (N. Y.) 533 (see *Bittiner v. Gomprecht*, 28 Misc. [2d] 218); *Polsley v. Anderson*, 7 W. Va. 202.

MacKie v. Howland, 3 App. D. C. 461; *Bright v. Hewes*, 18 La. 666; *Commandeur v. Carrollton*, 15 La. Ann. 7.

Pennington v. Underwood, 56 Ark. 53; *Walsh v. Shumway*, 65 Ill. 471; *McArthur v. Fry*, 10 Kan. 233; *Rousseau v. Marionneaux*, 1 La. Ann. 293; *Merchants' Nat. Bank v. Eustis*, 8 Tex. Civ. App. 34; *Safford v. Vermont & C. R. Co.*, 60 Vt. 185.

Walsh v. Shumway, 65 Ill. 471. As was said in this case: "He cannot rescind the contract at discretion, it results, from the very nature, that he may do so if the attorney fails to use reasonable diligence in the performance of his part of the undertaking."

C. & S.—98.

§ 711. Where ended by attorney's own act.

(a) **In general.**—When an attorney has been employed to carry on or defend a suit, the contract of employment is usually presumed to be an entire contract and to continue until the final termination of the suit or action, that is until the trial or final judgment or other termination, and the attorney cannot abandon his client's case without a just cause and reasonable notice.⁸⁷¹ If an attorney, therefore, without just cause abandons his employment, either by words or action before the case in which he was employed has been concluded, its termination, or before the contingency upon which his employment depended has happened, he will, in some jurisdictions, forfeit all right to compensation for any services he may have rendered.⁸⁷² This doctrine is based upon the ground that the contract being entire the attorney must perform it entirely, before he earns his compensation, and he is in the same position as any person who is engaged in rendering an entire service, who must show full performance before he can recover the stipulated compensation.⁸⁷³ Where his conduct is adverse to his client and to the advantage of the other side, it has been held that he has no right to compensation for any services.⁸⁷⁴ On the

other hand, whether, in such event, the attorney would be entitled to compensation for services rendered, has not been discussed in the present case; but, upon the well recognized principles governing analogous cases, we do not perceive how compensation can be given upon the principle of a quantum meruit. The contract is an entirety, and the attorney having failed to perform, there can be no apportionment of compensation. Of course it differs from a case where an attorney has been retained without a specific contract."

⁸⁷¹ *Menzies v. Rodrigues*, 1 Price, 92; *Cresswell v. Byron*, 12 D. & R. 272; *Nicholls v. Wilson*, 2 Dowl. (N. S.) 1032; *Whitehead v. Wilson*, 11 Eng. Law & Eq. 589; *Elliot v. Lawton*, 7 Allen (Mass.) 11; 41 Am. Dec. 683; *Tenney v. Berger*, 93 N. Y. 524, 45 Am. Rep. 263; *Bathgate v. Haskin*, 59 N. Y. 535; *Davis v. Smith*, 48 Vt. 52.

⁸⁷² *Tenney v. Berger*, 93 N. Y. 524, 45 Am. Rep. 263; *Holmes v. Evans*, 129 N. Y. 140; *Bolte v. Flichtner*, 68 Hun (N. Y.) 147; *Rehder v. Chism*, 5 Sneed (Tenn.) 116; *Southern Nat. Bank v. Blanton*, (Tex. Civ. App.) 36 S. W. 911; *Blanton v. King*, 73 Mo. App. 100.

⁸⁷³ *Tenney v. Berger*, 93 N. Y. 524, 45 Am. Rep. 263.

⁸⁷⁴ *Andrews v. Tyng*, 94 N. Y. 16.

there are cases, following the rule set forth in *Britton v. Turner*,⁸⁷⁵ holding that where one agrees to work a specified time, for an entire sum, he may recover for the value of his services rendered, less the loss suffered by the client on account of such abandonment, although he abandons the employment before the completion thereof, without just cause or the client's consent.⁸⁷⁶

(c) Abandonment justified.—Where, however, the attorney has a justifiable cause for his abandonment, or does so with the client's consent, he does not thereby forfeit all his rights to compensation, but may recover the reasonable value of services actually rendered, unless he waives or abandons his claim for compensation at the time of his withdrawal;⁸⁷⁷ and if he has made a special contract with his client to perform the services for a certain fee, he may recover the whole amount of the fee in the same manner as if the services had been completely performed, the cause for the abandonment being considered as an event of full performance, by the client.⁸⁷⁸ And if an attorney has a good cause for his withdrawal from the conduct of a suit then upon the trial list, in which his client has employed other counsel, and he gives written notice of his withdrawal to his client and to the opponent, it is not necessary that he should obtain the consent of the court, or of his client, to such withdrawal, in order that he may recover for his previous services.⁸⁷⁹ So if an attorney withdraws from a suit because he finds that the objects sought thereby are inconsistent with a previous employment, he does not forfeit his right to recover for his services under his former em-

See ante, § 367.

Morgan v. Roberts, 38 Ill. 65. See ante, § 367.

Coopwood v. Wallace, 12 Ala. 790; *Montgomery v. Montgomery*, 12 Ala. 677; *Sweeney v. Kerr's Ex'r*, 16 Ky. L. R. 33, 25 S. W. 273; *Wright v. Beckner*, 19 Ky. L. R. 521, 41 S. W. 35; *Elliot v. Lawton*, 7 Ky. L. R. 274, 83 Am. Dec. 683; *Powers v. Manning*, 154 Mass. 370; *Wright v. Berger*, 93 N. Y. 524, 45 Am. Rep. 263; *Campbell v. Good*, 23 Pa. Co. Ct. R. 609; *Verner v. Sullivan*, 26 S. C. 327; *Baird v. Atchiff*, 10 Tex. 81; *Ryan v. Martin*, 18 Wis. 672.

Hunt v. Test, 8 Ala. 713; *Polsley v. Anderson*, 7 W. Va. 202, 10 W. Va. Rep. 613; *Kersey v. Garton*, 77 N. W. 645; *Baldwin v. Ben*, 4 Cal. 392.

Powers v. Manning, 154 Mass. 370.

ployment.⁸⁸⁰ Where an attorney is employed by to settle up the firm affairs, and does so up to a certain point, where, the interests of the partners becoming adverse, he votes himself to the interests of one partner alone, he cannot recover compensation from the other partner for the services rendered before the interests of the parties become adverse, but not afterwards.⁸⁸¹

Where one member of a law firm has withdrawn from the tract of employment of such firm is of a divisible character, under which a recovery may be had for services, the client has already had the benefit, but such withdrawn partner can have no interest in fees for services rendered by the remaining member of the firm in concluding the particular business.⁸⁸²

(c) **What sufficient cause for abandonment.**—What constitutes a sufficient cause to justify an attorney in abandoning a case in which he has been retained is not and cannot be put down in any definite rule; but it would seem that a change of conduct on the part of the client that impedes or prevents the attorney from properly prosecuting the case is a sufficient cause. If the client refuses to advance money to defray the expenses of the litigation, or if he unreasonably refuses to advance money, during the progress of a long suit, the attorney may thus be furnished to justify an attorney in withdrawing from the service of his client.⁸⁸³ So any conduct on the part of the client, during the progress of the litigation which would tend to degrade or humiliate the attorney, or his attempt as attempting to sustain his case by the subornation

⁸⁸⁰ *Asher v. Beckner*, 19 Ky. L. R. 521, 41 S. W. 35.

⁸⁸¹ *Sweeney v. Kerr's Ex'r*, 16 Ky. L. R. 33, 25 S. W. 273.

⁸⁸² *Justice v. Lalry*, 19 Ind. App. 272. Compare *Knighthead v. More*, 125 Cal. 198.

⁸⁸³ *Tenney v. Berger*, 93 N. Y. 524, 45 Am. Rep. 266; *Ellis v. Tilton*, 7 Allen (Mass.) 274, 83 Am. Dec. 683. See post, § 100. An attorney may withdraw from the case or fail to appear at trial if the client fails to pay a retainer which he had expressly agreed to pay before the time for trial, and that the attorney will not try the case unless so paid. *Silver Peak Gold Min. Co. v. Silver Peak*, 116 Fed. 439.

by any other unjustifiable means, would furnish sufficient cause.⁸⁸⁴

Where the client employs counsel in the case, with his attorney cannot cordially co-operate, the attorney may withdraw from the suit.⁸⁸⁵ "The attorney," said the court in *Tenney v. Berger*,⁸⁸⁶ "is always interested with whom he is to be associated in the trial of a case. The counsel is supposed to be his superior, and is employed on account of his superior ability, experience, reputation or professional standing, and after an attorney is engaged in a cause, it would seem to be quite proper that he should be consulted as to the person who is to bear the most important relation to him of counsel. The client would not have any right, against the protest of the attorney, to introduce as counsel in the case a person of bad character or of much inferior standing and learning—one not qualified to give discreet or able advice. It would humiliate the attorney to sit down to the trial of a cause, and see it ruined by the mismanagement of counsel. The relations between attorney and counsel, too, are of a delicate and confidential nature. They should have faith in each other and their relations should be such that they can cordially co-operate. While the client has the undoubted right to employ any counsel he chooses, yet it is fair and proper, that professional etiquette requires, that he should consult his attorney, and other counsel in the case, so that they can advise him, if for any reason they do not desire to be associated with them."

Where the client was trying to make the attorney his agent in prosecuting and imprisoning a party against whom the client had no just claim or cause of arrest, but was induced by illegal or malicious motives,⁸⁸⁷ or where he was induced to get the attorney to do some other illegal or wrongful act, the attorney may be justified in abandoning the case.

Tenney v. Berger, 93 N. Y. 524, 45 Am. Rep. 266; *Campbell v. Peck*, 23 Pa. Co. Ct. R. 609.

Tenney v. Berger, 93 N. Y. 524, 45 Am. Rep. 266.

Tenney v. Berger, 93 N. Y. 524, 45 Am. Rep. 266.

Peck v. Chouteau, 91 Mo. 140, 60 Am. Rep. 236; *Burnap v. Burnap*, 3 Ill. 535.

§ 712. Where ended by operation of law.

(a) **In general.**—Where an attorney is incapacitated from continuing his services by operation of law, he is prevented thereby from recovering compensation for services already rendered. Thus, where an attorney becomes insane, which by law prevents him from appearing as attorney in court of record in the state, he may nevertheless recover for what services he has rendered in the case up to the time he is incapacitated.⁸⁸⁸

(b) **By death of attorney.**—So where an attorney's employment is ended by the death of the attorney, before his services are fully performed, the client could not be held liable for the whole compensation, but he would be liable to the attorney's personal representatives for the reasonable value of services rendered up to the time of the attorney's death.⁸⁸⁹ And if the client has paid his attorney in advance, either the whole or a portion of his fee, to conduct the case to its final termination, and the attorney dies before its completion, the client may recover from the attorney's representatives the unearned portion of the fee.⁸⁹⁰ But where an attorney was to receive nothing if the suit was unsuccessful, and he died during the pendency of the action, before recovery was had, the client is not liable to his personal representatives, even for the value of the services performed.

(c) **By death of client.**—Likewise the death of a client terminates the relation, where there is no special contract between the parties by which it is the attorney's duty to conduct the case to its final termination, and the latter is to recover compensation for services rendered up to the time of the client's death.⁸⁹² But if there has been an express contract by which the attorney was to conduct the case

⁸⁸⁸ *Baird v. Ratcliff*, 10 Tex. 81.

⁸⁸⁹ *Baylor v. Morrison*, 2 Bibb (Ky.) 103; *Gordon v. M. M.* Md. 204; *Callahan v. Shotwell*, 60 Mo. 398; *Clendinen v. Bailey* (S. C.) 488, 23 Am. Dec. 149; *Bills v. Polk*, 4 Lea 494; *Landa v. Shook* (Tex. Civ. App.) 31 S. W. 57.

⁸⁹⁰ *McCammon v. Peck*, 9 Ohio Circ. R. 589; *Callahan v. M.* 60 Mo. 398.

⁸⁹¹ *Badger v. Celler*, 41 App. Div. (N. Y.) 599.

⁸⁹² *Avery v. Jacob*, 38 N. Y. State Rep. 1026.

termination, it would seem that the death of the client would not operate to terminate the attorney's employment, affect his right to fees under the contract;⁸⁹³ unless he is prohibited from acting by the legal representatives of the client.⁸⁹⁴

13. Liability of client for retaining fees.

The authorities are not entirely in harmony as to the right of an attorney to a retaining fee, but it is perhaps the general rule that an attorney may demand and recover a retaining fee in every case in which he is retained, whether there has been an express contract to that effect or not.⁸⁹⁵ In some jurisdictions, however, it is held that the attorney's right to recover a retaining fee depends upon the contract between him and his client.⁸⁹⁶ As has been said: "In the absence of a special contract to pay these retainers the plaintiff must prove enough to show that there was an implied promise on the part of the defendant to pay them. The proper scope and application of the right to charge retainers is to remunerate counsel for being deprived, by being retained for one party, of the opportunity of rendering services for and receiving pay from the other—not to swell the amount of the bill which accrues for services rendered throughout the progress of the cause and contains specific charges for them all."⁸⁹⁷ And in another case the court would not allow a retaining fee because "no express agreement to pay a retainer was proved, and an agreement to pay a retainer for services which are never performed is not to be implied."⁸⁹⁸

Grapel v. Hodges, 112 N. Y. 419; *Jeffries v. New York M. L. Co.*, 110 U. S. 305; *Headley v. Good*, 24 Tex. 232.

Labauve's Succession, 34 La. Ann. 1187.

Blackman v. Webb, 38 Kan. 668; *Aldrich v. Brown*, 103 Mass. 504; *Perry v. Lord*, 111 Mass. 504; *Eggleston v. Boardman*, 37 N. H. 14.

McLellan v. Hayford, 72 Me. 410, 39 Am. Rep. 343; *Neighbors v. State*, 41 Md. 478.

McLellan v. Hayford, 72 Me. 410, 39 Am. Rep. 345; *In re Schallert*, 10 Daly (N. Y.) 57.

Windett v. Union M. L. Ins. Co., 144 U. S. 581. And see *Orr v. Brown*, 69 Fed. 216.

The right to a retaining fee does not depend upon actual performance of services, for the retainer precedes rendering of services; and if there has been a special contract for a retaining fee to an attorney, a recovery may be had thereon without proof of any services at all or that the contract was fair and reasonable.⁸⁹⁹ And a client cannot escape the liability for a stipulated retaining fee by merely electing to dispense with the attorney's services.⁹⁰⁰

Usually an attorney cannot charge more than one retaining fee in the same case, and if he charges more than one he will not be allowed to recover such extra charge in addition for his services,⁹⁰¹ as where several plaintiffs appear and plead by one attorney, only one retaining fee will be allowed against the plaintiffs;⁹⁰² but it is otherwise where they appear by different attorneys.⁹⁰³ An attorney who is employed to act as the general adviser of his client is not entitled to charge a retaining fee in suits that he is called upon to conduct in the course of his regular duties.⁹⁰⁴

§ 714. Liability of client for fees of associate counsel.

As has been seen heretofore, an attorney has no implied power, under a general retainer, to delegate his duties to another unless authority to do so is expressly given to him. And if an attorney employed to conduct a case employs another attorney to assist him, the client is not liable for the fees of the associate counsel;⁹⁰⁵ unless the attorney is spec-

⁸⁹⁹ *Union Surety & Guaranty Co. v. Tenney*, 200 Ill. 349.

⁹⁰⁰ *Union Surety & Guaranty Co. v. Tenney*, 200 Ill. 349.

⁹⁰¹ *Schnell v. Schlernitzauer*, 82 Ill. 439.

⁹⁰² *Morton's Ex'rs v. Croghan*, 1 Cow. (N. Y.) 233.

⁹⁰³ *Morton's Ex'rs v. Croghan*, 1 Cow. (N. Y.) 233.

⁹⁰⁴ *In re Schaller*, 10 Daly (N. Y.) 57.

⁹⁰⁵ *Humes v. Decatur Land Imp. & Furnace Co.*, 98 Ala. 461; *Terter v. Elizalde*, 125 Cal. 204; *Mathews v. Giles*, 108 Ga. 364; *Miller v. Mohr*, 153 Ill. 561; *Price v. Hay*, 132 Ill. 543; *Hughes v. Zeigler*, 69 Ill. 38; *Brown v. Underhill*, 4 Ind. App. 77; *Moore v. O'Connell*, Ind. App. 89; *Antrobus v. Sherman*, 65 Iowa, 230, 54 Am. Rep. 100; *Cincinnati Sav. Bank v. Benton*, 2 Metc. (Ky.) 240; *Nevin v. American Sav. Bank's Assignee*, 21 Ky. L. R. 596, 52 S. W. 811; *Whitlow's Adm'r v. Whitlow's Adm'r*, 22 Ky. L. R. 1179, 60 S. W. 100; *Jones v. Goza*, 16 La. Ann. 428; *Voorhies v. Harrison*, 22 La.

authorized to employ such associate counsel,⁹⁰⁶ or unless the client has, with a full knowledge of the facts, expressly or impliedly ratified the act of the attorney in so employing another.⁹⁰⁷ Thus, "if the attorney, who has the management of the suit, employs an assistant at the trial, and the client is present at, and sees the person thus employed assist in managing and conducting the suit, the inference would be strong, if not conclusive, that he consented to such employment, and he would be liable for the fees of assistant counsel."⁹⁰⁸ So where the client deals with and recognizes an attorney employed by the original attorney, such subattorney may recover his fees from the client;⁹⁰⁹ and such right of the assistant counsel would not be affected by a secret agreement between the client and the original attorney whereby the latter is to pay the fees of the assistant.⁹¹⁰ But where the client supposed that the assistant was looking to the original attorney for his compensation, the fact that he recognized him does not amount to a ratification, and he would not be liable for such assistant's fees.¹ Nor does the fact that the client pays one associate

Ellon v. Watson, 3 Neb. Unoff. 530; *In re Hynes*, 105 N. Y. 538; *Harwood v. La Grange*, 137 N. Y. 538; *Crosby v. Kropf*, 33 App. Div. (N. Y.) 446; *Scott v. Hoxsle*, 13 Vt. 50; *Willard v. Town of Middlebury*, 45 Vt. 93; *Paddock v. Colby*, 18 Vt. 485.

Miller v. Ballerino, 135 Cal. 566; *Nave v. Tucker*, 70 Ind. 15; *Smith v. Brown*, 103 Mass. 527; *Sedgwick v. Bliss*, 23 Neb. 617; *Nat. Bank of Denison v. Hodges* (Tex. Civ. App.) 62 S. W. 2d 115; *Griggs v. Town of Georgia*, 10 Vt. 68.

King v. Pope, 28 Ala. 601; *Porter v. Elizalde*, 125 Cal. 204; *Smith v. Edwards*, 65 Ind. 372; *Aldrich v. Brown*, 103 Mass. 527; *Smith v. Akeley*, 82 Minn. 354; *Cook v. Ritter*, 4 E. D. Smith (N. Y.) 378; *Reese v. Resburgh*, 54 App. Div. (N. Y.) 378; *Rogers v. Smith*, 81 N. C. 164; *Holmes v. Holland*, 29 Wkly. Law Bul. 115; *Smith v. Lipscomb*, 13 Tex. 532; *Paddock v. Colby*, 18 Vt. 485.

Griggs v. Town of Georgia, 10 Vt. 68.

Logan v. Edwards, 65 Ind. 372; *Sedgwick v. Bliss*, 23 Neb. 617.

McCrary v. Ruddick, 33 Iowa, 521; *Brigham v. Foster*, 7 Allen 419; *Miller v. Ballerino*, 135 Cal. 566. But see *Herndon v. Smith* (Tex. Civ. App.) 55 S. W. 414.

Judspeth v. Yetzer, 78 Iowa, 13; *McCarthy v. Crump*, 17 Colo. 10.

counsel amount to a ratification of the employment of a former associate employed by the original attorney.⁹¹²

§ 715. Liability of client for interest.

Where an attorney brings an action against his client to recover for services rendered, he can recover interest on the amount of compensation claimed by him from the date an account was rendered to the client as a liquidated debt, or on a demand made for the payment thereof;⁹¹³ or on the date of judgment;⁹¹⁴ or on his fees from the time they became due until paid;⁹¹⁵ and on disbursements from the time when made.⁹¹⁶ Or where the client discharges the attorney he is liable for interest on the value of services rendered from the date of such discharge.⁹¹⁷

VIII. ATTORNEY'S LIEN.

§ 716. Classes.

Having considered an attorney's right to fees or compensation for services rendered by him for his client, it remains to be seen how he is protected in the securing and enforcement of payment of such fees. The law having seen at an early date that injustice might be done to an attorney by a scrupulous client by refusing or failing to pay his fees, he had performed his services, protected the attorney by means of certain liens on the client's effects, for compensation due to the attorney. Especially was this found necessary as usually only a small part, if any, of the attorney's fees, was paid to him before he had completed his services.

These liens are of two kinds or classes: (1) The general retaining lien, and (2) the special or charging lien.⁹¹⁸

⁹¹² *Evans v. Mohr*, 153 Ill. 561.

⁹¹³ *Gallup v. Perue*, 10 Hun (N. Y.) 525; *Mygatt v. Wilcox*, 10 N. Y. 306, 6 Am. Rep. 90; *Hadley v. Ayres*, 12 Abb. Pr. (N. S.); 240; *Rexford v. Comstock*, 3 N. Y. Supp. 876.

⁹¹⁴ *Louisville Gas Co. v. Hargis*, 17 Ky. L. R. 1190, 33 S. W.

⁹¹⁵ *Adams v. Fort Plain Bank*, 36 N. Y. 255.

⁹¹⁶ *Rexford v. Comstock*, 3 N. Y. Supp. 876; *Hadley v. Ayres*, 10 N. Y. 306, 6 Am. Rep. 90; *Abb. Pr. (N. S.; N. Y.)* 240.

⁹¹⁷ *Com. v. Terry*, 11 Pa. Super. Ct. 547.

⁹¹⁸ See *Mosely v. Norman*, 74 Ala. 422; *In re Wilson*, 12 Fed.

ure to notice the clear distinction between these two
uses has often caused apparent confusion and conflict
this subject.⁹¹⁹ It will be the purpose of the following
ions, then, to consider in order the different phases of these
classes, showing clearly the distinctions between them.

A. General or Retaining Lien.

17. Definition and nature.

An attorney's general or retaining lien is the right in
to retain in his possession all property of the client that
es into his hands during the course of his professional
ployment, until his fees and charges are paid.⁹²⁰ Thus,
general rule, subject to the qualifications hereafter noted,
attorney has a general lien upon all moneys, and upon all
ers, books or other property, that may come into his
ds, while acting in the capacity of attorney for his client,
secure to him the payment of all fees and legitimate
rges due him, as attorney, by his client.⁹²¹ This general
of an attorney is merely a passive one, and cannot be
vely enforced, either at law or in equity. It is a mere
t, on the part of the attorney, to retain the papers, or
er property, in his hands until his claims, against the
nt, for professional services and disbursements have been
y satisfied;⁹²² and the attorney has no right to sell the

ders v. Seelye, 128 Ill. 631; Manning v. Leighton, 65 Vt. 84, 95;
on v. Bolland, 4 Mylne & C. 354.

o Weed Sewing Mach. Co. v. Boutelle, 56 Vt. 570, 48 Am. Rep.
Hurlbert v. Brigham, 56 Vt. 368.

o Weed Sewing Mach. Co. v. Boutelle, 56 Vt. 570, 48 Am. Rep. 821.
Jones, Liens, § 113 et seq.

In re Wilson, 12 Fed. 235; Gist v. Hanly, 33 Ark. 233; Jones
Morgan, 39 Ga. 310, 99 Am. Dec. 458; McDonald v. Napier, 14
89; Sanders v. Seelye, 128 Ill. 631; Jennings v. Bacon, 84 Iowa,
406; Pierce v. Underwood, 103 Mich. 62; Robinson v. Hawes,
Mich. 135; Dennett v. Cutts, 11 N. H. 163; In re Knapp, 85 N. Y.
Longworth v. Handy, 2 Disn. (Ohio) 75; Dubois' Appeal, 38
231, 80 Am. Dec. 478; McDonald v. Charleston, C. & C. R. Co., 93
n. 281; Casey v. March, 30 Tex. 181; Hooper v. Welch, 43 Vt.
5 Am. Rep. 267; Manning v. Leighton, 65 Vt. 95; Scott v. Dar-
66 Vt. 510.

Bozon v. Bolland, 4 Mylne & C. 354; Brown v. Bigley, 3 Tenn.

property to which the lien attaches⁹²³ in the absence of a statute permitting it. Thus, where an attorney has money or books and papers, in his hands, he may retain them until his claim for fees and disbursements have been satisfied and he cannot be compelled to deliver them over to another attorney, although they may be needed for the trial of a case, until his demand is paid.⁹²⁵

This lien is originally a common law one. But in some states it is specially prescribed by statute, and in such cases the statute is merely declaratory of the common law.

§ 718. Depends upon possession.

But in order that this general or retaining lien may exist in favor of the attorney it is necessary that he should have in his possession, as attorney, the money, books, papers or other property against which the lien exists.⁹²⁷ Until

Ch. 618, 621; *In re Wilson*, 12 Fed. 235; *McDonald v. Charleston C. & C. R. Co.*, 93 Tenn. 281, 293; *Gottstein v. Harrington*, 25 W. 508.

⁹²³ *McDonald v. Charleston, C. & C. R. Co.*, 93 Tenn. 281.

⁹²⁴ *In re Paschal*, 10 Wall. (U. S.) 483, 497.

⁹²⁵ *Curtis v. Richards*, 4 Idaho, 434; *Finance Co. of Pennsylvania v. Charleston, C. & C. R. Co.*, 48 Fed. 45; nor by a subpoena duces tecum, *Davis v. Davis*, 90 Fed. 791.

⁹²⁶ As was said in *Sayre v. Thompson*, 18 Neb. 42: "Our statute provides (Comp. St. 1881, c. 7, § 8): 'An attorney has a lien for a general balance of compensation upon any papers of his client which have come into his possession in the course of his professional employment, upon money in his hands belonging to his client, or in the hands of the adverse party in an action or proceeding in which the attorney was employed from the time of giving notice of the lien to that party.' This I understand to be but a recognition of the common law." And see *Mills' Ann. St. Colo.* 1887, 212; *Iowa Code* 1897, § 321; *Dak. Comp. Laws* 1887, § 470; *Code* 1895, § 2814; *Gen. St. Kan.* 1899, § 395; *Ky. St.* 1894, § 1000; *Gen. St. Minn.* 1894, § 6194; *Hill's Ann. Laws Or.* 1892, § 1000; *Wyo. Rev. St.* 1899, § 2911; 2 *Ball. Ann. Codes & St. Wash.* 4772.

⁹²⁷ *Hough v. Edwards*, 1 Hurl. & N. 171; *Stevenson v. Blake*, 1 Maule & S. 535; *In re Wilson*, 12 Fed. 235; *Fulton v. Harrington*, 7 Houst. (Del.) 182; *Nichols v. Pool*, 89 Ill. 491; *Foss v. Coe*, 105 Iowa, 728; *Stewart v. Flowers*, 44 Miss. 518, 7 *Am. Rep.* 100; *Wright v. Cobleigh*, 21 N. H. 339; *Dennett v. Cutts*, 11 N. H.

requires possession of such property the lien does not arise, and upon his voluntarily parting with such possession, it ceases. He has no general lien upon anything belonging to his client, that he has not in his possession as attorney.⁹²⁸ Thus he can have no general lien upon damages recovered in a case, before they are paid over to him;⁹²⁹ nor upon funds which are in the defendant's hands,⁹³⁰ or in court,⁹³¹ or in the hands of a sheriff;⁹³² nor upon money appropriated by an act of legislature to his client, whilst the state treasurer still retains it in his control.⁹³³

719. Assignability.

An attorney's general lien upon the property of his client in his possession is one strictly personal to the attorney, and cannot be assigned or transferred by him to a third person.⁹³⁴ And if the attorney does so permit the papers, etc., of a client to go out of his hands into those of a third party, it is a breach of trust which will justify the client in terminating the attorney's employment, and prevent the attorney from recovering compensation for services rendered.⁹³⁵ And under such circumstances the third party could not retain possession of the papers from the client as security for the unpaid claim, but would have to deliver them up, and be remitted to an action for any claim he might have against the client.⁹³⁶

⁹²⁸ *John v. Diefendorf*, 12 Wend. (N. Y.) 261; *Dubois' Appeal*, 38 Pa. 231, 80 Am. Dec. 478; *Eddinger v. Adams*, 4 Kulp (Pa.) 401; *Kelvy's & Sterrett's Appeals*, 108 Pa. 615; *Casey v. March*, 30 Vt. 181; *Manning v. Leighton*, 65 Vt. 84.

⁹²⁹ *St. John v. Diefendorf*, 12 Wend. (N. Y.) 261.

⁹²⁹ *St. John v. Diefendorf*, 12 Wend. (N. Y.) 261.

⁹³⁰ *Manning v. Leighton*, 65 Vt. 84.

⁹³¹ *Dubois' Appeal*, 38 Pa. 231, 80 Am. Dec. 478; *Gregory v. Pike*, 10 Fed. 837.

⁹³² *Irwin v. Workman*, 3 Watts (Pa.) 357.

⁹³³ *State v. Moore*, 40 Neb. 854.

⁹³⁴ *Sullivan v. New York City*, 68 Hun (N. Y.) 544; *Lovett v. Brown*, 40 N. H. 511; *Meany v. Head*, 1 Mason, 319, Fed. Cas. No. 179; *In re Willson*, 12 Fed. 235.

⁹³⁵ *Sullivan v. New York City*, 68 Hun (N. Y.) 544.

⁹³⁶ *Sullivan v. New York City*, 68 Hun (N. Y.) 544.

§ 720. Fees and charges covered by this lien.

It seems to be a well settled rule that this general lien in favor of the attorney covers all fees and charges that may be due by the client to the attorney for professional services rendered and disbursements made by the latter on behalf of the former;⁹³⁷ and this includes not only all fees and legitimate charges that may be due him in the particular transaction, in which possession of the money, books, or other property was obtained, but also any balance that may be due the attorney for professional services, disbursements or in any other transaction.⁹³⁸ It extends, however, only to amounts actually due or in good faith believed to be due from the client to his attorney, and if an attorney receives out of money collected by him more than is due him or than he in good faith believes to be due him, he will not be criminally liable.⁹³⁹ But it does not extend to debts due him in any other capacity than as attorney;⁹⁴⁰ nor does it extend to damages resulting from the client's breach of contract.

⁹³⁷ *Dubois' Appeal*, 38 Pa. 231, 80 Am. Dec. 478; *Jones v. Gan*, 39 Ga. 310, 99 Am. Dec. 458; *Jennings v. Bacon*, 84 Iowa

⁹³⁸ *England*: *Ex parte Sterling*, 16 Ves. 258; *Ex parte Pemberton*, 18 Ves. 282; *Stevenson v. Blakelock*, 1 Maule & S. 535; *Worrall v. Johnson*, 2 Jac. & W. 218.

United States: *Finance Co. of Pennsylvania v. Charleston*, 100 U. S. 312; *C. R. Co.*, 46 Fed. 426; *In re Wilson*, 12 Fed. 235; *McPherson v. Cox*, 96 U. S. 404.

Alabama: *Mosely v. Norman*, 74 Ala. 424.

Connecticut: *Cooke v. Thresher*, 51 Conn. 105.

Louisiana: *Butchers' Union Slaughter-House & L. S. Land Co. v. Crescent City Live-Stock Landing & S. H. Co.*, 41 La. 355.

Michigan: *Robinson v. Hawes*, 56 Mich. 135.

New York: *Bowling Green Sav. Bank v. Todd*, 52 N. Y. 48; *re Knapp*, 85 N. Y. 284; *In re H—*, 87 N. Y. 521.

Ohio: *Longworth v. Handy*, 2 Disn. 75.

Tennessee: *McDonald v. Charleston, C. & C. R. Co.*, 93 Tenn. 291.

Vermont: *Hooper v. Welch*, 43 Vt. 169, 5 Am. Rep. 267; *Scoville v. Darling*, 66 Vt. 510; *Hurlbert v. Brigham*, 56 Vt. 368; *Weed Storage & Mach. Co. v. Boutelle*, 56 Vt. 570, 48 Am. Rep. 821.

⁹³⁹ *Robinson v. Hawes*, 56 Mich. 135.

⁹⁴⁰ *In re Galland*, 31 Ch. Div. 296; *Worrall v. Johnson*, 2 J. & W. 218; *Lorillard v. Barnard*, 42 Hun (N. Y.) 545.

et concerning the prosecution of suits.⁹⁴¹ Nor does one member of a firm of attorneys have a lien for an individual demand, not connected with the firm, upon such papers or property held by his firm.⁹⁴²

It has been held, however, that in the case of money collected by the attorney, he has a general lien on such money for the sum due him in the particular case in which it was received, and not for any balance due him for professional services rendered in other cases.⁹⁴³

21. Property attached by this lien—In general.

As a general rule, an attorney's general or retaining lien attaches to all moneys, books, papers, or property of any kind, of his client, that come into the attorney's hands while acting in the course of his employment as attorney, and is held by him;⁹⁴⁴ and usually it matters not for what

¹ *Lorillard v. Barnard*, 42 Hun (N. Y.) 545.

² *Bowling Green Sav. Bank v. Todd*, 52 N. Y. 489.

³ *Waters v. Grace*, 23 Ark. 118; *Cage v. Wilkinson*, 3 Smedes & (Miss.) 223; *Pope v. Armstrong*, 3 Smedes & M. (Miss.) 214; *Neely v. Demoss*, 3 How. (Miss.) 175; *Casey v. March*, 30 Tex.

Fargo Gaslight & Coke Co. v. Greer, 18 Ohio Circ. R. 189; *Stanton v. Throckmorton*, 15 Pa. Super. Ct. 632.

⁴ *England*: *Worrall v. Johnson*, 2 Jac. & W. 214; *Stevenson v. Kellock*, 1 Maule & S. 535; *Hollis v. Claridge*, 4 Taunt. 807.

United States: *In re Paschal*, 10 Wall. 483; *In re Wilson*, 12 Fed. 235; *Finance Co. of Pennsylvania v. Charleston, C. & C. R. Co.*, Fed. 426.

Georgia: *McDonald v. Napier*, 14 Ga. 89.

Illinois: *Sanders v. Seelye*, 128 Ill. 631.

Iowa: *Jennings v. Bacon*, 84 Iowa, 403.

Kentucky: *McIntosh v. Bach*, 23 Ky. L. R. 74, 62 S. W. 515.

Louisiana: *Hodges v. Ory*, 48 La. Ann. 54.

Michigan: *Pierce v. Underwood*, 103 Mich. 62; *Robinson v. Ames*, 56 Mich. 135.

Mississippi: *Stewart v. Flowers*, 44 Miss. 513, 7 Am. Rep. 707.

New Hampshire: *Wright v. Cobleigh*, 21 N. H. 339.

New York: *In re Knapp*, 85 N. Y. 284; *Ward v. Craig*, 87 N. Y. 521; *In re H—*, 87 N. Y. 521.

Ohio: *Longworth v. Handy*, 2 Disn. 75.

Tennessee: *McDonald v. Charleston, C. & C. R. Co.*, 93 Tenn. 281.

Texas: *Casey v. March*, 30 Tex. 181.

Vermont: *Patrick v. Hazen*, 10 Vt. 183; *Weed Sewing Mach. Co.*

purpose the property came into his hands, so long as it was so in the course of professional business;⁹⁴⁵ nor does it matter that the attorney also occupies some other business relation towards his client.⁹⁴⁶ Thus he may have a general lien on all bonds, notes, receipts, contracts, deeds, mortgages and other papers of his client that come into his possession during the course of his professional employment.⁹⁴⁷ If bonds had been stolen the attorney's general lien attaches to them or their proceeds only to the extent of services rendered by the attorney before he had notice of the fact that they had been stolen.⁹⁴⁸ He may have such a lien upon a bond or mortgage put into his hands for foreclosure upon negotiable paper or warrants in his hands for collection.⁹⁵⁰

So this lien attaches to any other property that may come into the attorney's hands professionally, as where articles were delivered to him to be shown to witnesses, and if at any time the client changes his attorneys, he does not take from the former attorney the property on which he has a general lien, until his fees and costs have been paid.

v. Boutelle, 56 Vt. 570, 48 Am. Rep. 821; *Hooper v. Welch*, 171, 5 Am. Rep. 267; *Manning v. Leighton*, 65 Vt. 95; *Darling*, 66 Vt. 510.

Wisconsin: *Howard v. Osceola*, 22 Wis. 453.

⁹⁴⁵ *Sanders v. Seelye*, 128 Ill. 631. But see some exceptions to this rule, post, § 724.

⁹⁴⁶ *King v. Sankey*, 6 Nev. & M. 839.

⁹⁴⁷ *McPherson v. Cox*, 96 U. S. 404; *Finance Co. of Pennsylvania v. Charleston, C. & C. R. Co.*, 46 Fed. 426, 52 Fed. 526; *Cox & West R. Co.*, 65 Fed. 16; *Gist v. Hanly*, 33 Ark. 233; *Sanders v. Seelye*, 128 Ill. 631; *Stewart v. Flowers*, 44 Miss. 513, 77 Miss. 707; *Dennett v. Cutts*, 11 N. H. 163; *St. John v. Diefenderfer*, 1 Wend. (N. Y.) 261; *In re Russell*, 1 How. Pr. (N. Y.) 1; *Bank of Albany v. Sargent*, 104 N. Y. 108, 56 Am. Rep. 490; *Appel v. Kely & Sterrett*, 108 Pa. 615; *Hutchinson v. Howard*, 15 Pa. 453; *Gottstein v. Harrington*, 25 Wash. 508; *Howard v. Osceola*, 22 Wis. 453; *Dickinson v. Ritchie*, 50 Wis. 365.

⁹⁴⁸ *Newton v. Porter*, 5 Lans. (N. Y.) 416.

⁹⁴⁹ *Bowling Green Sav. Bank v. Todd*, 52 N. Y. 489.

⁹⁵⁰ *Sanders v. Seelye*, 128 Ill. 631; *Dennett v. Cutts*, 11 N. H. 163; *Howard v. Osceola*, 22 Wis. 453.

⁹⁵¹ *Friswell v. King*, 15 Sim. 191.

⁹⁵² But in certain cases, where the attorney refuses to proceed with a cause, the client may obtain an order of the court for the delivery to the new solicitor of papers in the attorney's possession, subject, however, to the attorney's lien, so that they may be redelivered to him when they have been used for the purpose for which they were ordered delivered;⁹⁵³ or by the court ordering the attorney's fees to be secured, especially where there is any doubt as to the validity of the attorney's claim, or if the retention of the papers would embarrass the client's claim.⁹⁵⁴ It has been held that if the attorney of his own will withdraws from the case he has not a right to retain the property until his fees are paid.⁹⁵⁵ It is also held that an attorney's lien on claims in his hands does not extend to demands on behalf of the state, and hence an attorney who has recovered moneys for the state cannot keep and retain the same to enforce payment for his services.⁹⁵⁶

Attorney's general lien upon money collected.

An attorney's general or retaining lien also attaches to money collected and held by him, for his client, within the course of his employment as attorney;⁹⁵⁷ but it does not

attach *ex parte* Yalden, 4 Ch. Div. 129.

Stane v. Martin, 2 Beav. 584; *Wilson v. Emmett*, 19 Beav. 233;

Stave v. Manley, Turn. & R. 400.

Muningham v. Widing, 5 Abb. Pr. (N. Y.) 413; *In re Galland*,

10 Ch. Div. 296; *In re Bevan*, 33 Beav. 439; *In re Jewitt*, 34 Beav.

White v. Harlow, 5 Gray (Mass.) 463. But see *Finance Co. v. Pennsylvania v. Charleston, C. & C. R. Co.*, 48 Fed. 45.

Tendrick v. Posey, 104 Ky. 8.

In re Paschal, 10 Wall. (U. S.) 483; *Cooke v. Thresher*, 51

105 (if there was an agreement); *McDonald v. Napier*, 14

(said to be a special lien on such money); *Union M. L. Ins.*

Buchanan, 100 Ind. 63; *Butchers' Union Slaughterhouse & L.*

Widing Co. v. Crescent City Live Stock Landing & S. H. Co.,

100 Ann. 355; *Dowling v. Eggemann*, 47 Mich. 171; *Stewart v.*

Es, 44 Miss. 513, 7 Am. Rep. 707; *Van Etten v. State*, 24 Neb.

Wells v. Hatch, 43 N. H. 246; *Sparks v. McDonald* (N. J. Eq.)

369; *In re King*, 61 App. Div. (N. Y.) 152; *In re Knapp*, 85

284; *Bowling Green Sav. Bank v. Todd*, 52 N. Y. 489; *Krone*

et al., 3 App. Div. (N. Y.) 587; *In re Holland Trust Co.*, 76 Hun.

et al. & S.—99.

attach until the money is collected and in the hands of the attorney.⁹⁵⁸ Thus it attaches to money collected by the attorney on a judgment.⁹⁵⁹ And where an attorney has accepted an order to pay over to the plaintiff, for his benefit whatever money he might collect in a certain suit, he has the right to retain his commission for collecting.⁹⁶⁰ But an attorney, who receives from a collection agency a claim in the name of another person, may not retain the money collected thereon to satisfy his demand against the agency for services rendered it.⁹⁶¹

The attorney, however, cannot retain the whole amount collected by him for his client, because a small part is due to him for fees. He will be permitted to retain enough to cover his fees and charges, and the remainder must be paid over to his client.⁹⁶² But if the amount he receives equals or exceeds the amount collected, he may retain the whole amount.⁹⁶³ And in some cases it is held that the attorney's general lien on money collected does not extend to a general balance due him for professional services, but only for the amount due him for services rendered in making the collection.⁹⁶⁴

(N. Y.) 323; *Diehl v. Friester*, 37 Ohio St. 473; *Christy v. Do Wright* (Ohio) 485; *Fargo Gaslight & Coke Co. v. Greer*, 18 Circ. R. 589; *Dubois' Appeal*, 38 Pa. 231, 80 Am. Dec. 478; *Bals v. Frazer*, 19 Pa. 95 (but see *Walton v. Dickerson*, 7 Pa. Read v. Bostick, 6 Humph. (Tenn.) 321; *Randolph v. Randolph*, Tex. 181; *Kinsey v. Stewart*, 14 Tex. 457; *Casey v. March*, 30 Tex. 180; *Weed Sewing Mach. Co. v. Boutelle*, 56 Vt. 570, 48 Am. 821; *Scott v. Darling*, 66 Vt. 510.

⁹⁵⁸ *St. John v. Diefendorf*, 12 Wend. (N. Y.) 261; *Fulton v. Arlington*, 7 Houst. (Del.) 182; *Braden v. Ward*, 42 N. J. Law Casey v. March, 30 Tex. 180.

⁹⁵⁹ *Wells v. Hatch*, 43 N. H. 246; *Bowling Green Sav. Ba Todd*, 52 N. Y. 489.

⁹⁶⁰ *Kinsey v. Stewart*, 14 Tex. 457.

⁹⁶¹ *McMath v. Maus Bros. Boot & Shoe Store*, 12 Ky. L. R. 9 S. W. 879.

⁹⁶² *Miller v. Atlee*, 3 Exch. 799; *Jeffries v. Laurie*, 23 Fed. Conyers v. Gray, 67 Ga. 329; *Charboneau v. Orton*, 43 Wis. 96. see *In re Rowland*, 55 App. Div. (N. Y.) 66.

⁹⁶³ *Ward v. Craig*, 87 N. Y. 550.

⁹⁶⁴ *Waters v. Grace*, 23 Ark. 118; *McDonald v. Napier*, 14 G

Where an attorney has a lien, by statute, on money collected by him, for a general balance due him, he cannot be held liable to a prosecution for embezzlement of the money obtained by him pending a suit between him and his client as to the amount of the compensation and the general account between them.⁹⁶⁵

23. Attorney's general lien where client is an executor.

Where an attorney has rendered professional services to an executor in the administration of an estate, it has been held that he has a lien on property of such estate which has been delivered into his hand by such executor in his representative capacity.⁹⁶⁶ Thus an attorney for one of two joint executors has a lien on funds of the estate, coming into possession as attorney for one of the executors, for services rendered in and about the administration of the estate, and may appropriate such funds in payment for his services.⁹⁶⁷ But if an administrator of an insolvent estate, himself acts as attorney for the intestate, before his death, in collecting and obtaining claims, he has no lien on money paid to him as administrator, for services rendered on such claims.⁹⁶⁸

24. Property not attached by attorney's general lien.

If, however, an attorney gets possession of the property in any other capacity, or through any other employment, than as attorney, this general or retaining lien will not attach.⁹⁶⁹ It does not attach to property which has been delivered to him for a special purpose, by reason of which a trust arises and the attorney stands in the capacity of a trustee;⁹⁷⁰ but

Ge v. Wilkinson, 3 Smedes & M. (Miss.) 223; *Pope v. Armstrong*, 3 Smedes & M. (Miss.) 214; *Harney v. Demoss*, 3 How. (Miss.) 175; *Marks v. McDonald* (N. J. Eq.) 41 Atl. 369; *Fargo Gaslight & Coke Co. v. Greer*, 18 Ohio Circ. R. 589; *Martin v. Throckmorton*, 15 Pa. Super. Ct. 632; *Casey v. March*, 30 Tex. 181.

⁹⁶⁵ *Van Etten v. State*, 24 Neb. 734.

⁹⁶⁶ *In re Knapp*, 85 N. Y. 284. And see *De Lamater v. McCaskie*, 10 Dem. Sur. (N. Y.) 549.

⁹⁶⁷ *Arkenburgh v. Little*, 49 App. Div. (N. Y.) 636.

⁹⁶⁸ *Newell v. West*, 149 Mass. 520.

⁹⁶⁹ *In re Clark*, 4 Ch. Div. 515; *Ex parte Newland*, 4 Ch. Div. 515.

⁹⁷⁰ *Lawson v. Dickenson*, 8 Mod. 306; *Pelly v. Wathen*, 7 Hare,

if such property is allowed to remain in the attorney's after the particular purpose has been accomplished it be subject to such general lien of the attorney.⁹⁷¹ No this lien attach to a will of the client,⁹⁷² or to an on record of the court.⁹⁷³ And as this lien depends upon p sion the attorney can have no general lien on property is not in his possession.⁹⁷⁴

Where papers are received by a law firm, they are no ject to a lien for a debt of an individual member of firm;⁹⁷⁵ but where he first had possession, he does no his lien by reason of the fact that the property after continues in the possession of the firm.⁹⁷⁶

§ 725. Priority of attorney's general lien.

An attorney's general lien is superior to the clien signment for the benefit of creditors,⁹⁷⁷ or in ban cy or insolvency.⁹⁷⁸ So it is good against all partie claim, under or through the client;⁹⁷⁹ and against fers, sales, and assignments generally.⁹⁸⁰ It also is

351; *Newell v. West*, 149 Mass. 520; *Bracher v. Olds*, 60 N. 449; *West v. Bacon*, 164 N. Y. 425; *State v. Lucas*, 24 Or. 16 derson v. Bosworth, 15 R. I. 443, 2 Am. St. Rep. 910; *Ma Besser*, 44 Tex. 506; *Goodrich v. Mott*, 9 Vt. 395.

⁹⁷¹ *Ex parte Pemberton*, 18 Ves. 282; *Ex parte Sterling*, 1 258.

⁹⁷² *Balch v. Symes*, 1 Turn. & R. 87; *Georges v. Georges*, 1 294. An attorney who drew a will and performed other s for the testator has not the right to retain possession of suc and withhold it from probate until his bill for such serv paid, and he may be cited to produce such will. In re *Bracher* (N. J. Prerog.) 51 Atl. 63.

⁹⁷³ *Clifford v. Turrill*, 2 De Gex & S. 1; *Wright v. Coble* N. H. 339.

⁹⁷⁴ See ante, § 718.

⁹⁷⁵ *Bowling Green Sav. Bank v. Todd*, 52 N. Y. 489; *P Wathen*, 7 Hare, 351.

⁹⁷⁶ *Pelly v. Wathen*, 7 Hare, 351.

⁹⁷⁷ *Ward v. Craig*, 87 N. Y. 550.

⁹⁷⁸ *Ex parte Sterling*, 16 Ves. 258; *Ex parte Bush*, 7 Vin. A

⁹⁷⁹ In re *Gregson*, 26 Beav. 87.

⁹⁸⁰ *Weed Sewing Mach. Co. v. Boutelle*, 56 Vt. 570, 48 Am 821.

against garnishment or attachment by the creditors of the client;⁹⁸¹ and in these cases the attorney having possession of the thing to which the lien attaches, no notice is needed to protect it against assignment by the client or attachment by trustee process by his creditors.⁹⁸² Neither the client himself, nor one claiming under him, can recover on the attorney the subject-matter of the lien, without first satisfying the attorney for the general balance due him by the client.⁹⁸³

Although the attorney has not fully completed the performance of his contract, but in good faith intends to do so, he may, as against the client or his creditor, retain the whole amount agreed upon for the services.⁹⁸⁴ But such retention is not good as against pre-existing rights of third persons.⁹⁸⁵

26. How this lien is enforced.

As has been seen heretofore, this lien is merely a passive one and cannot be actively enforced by the attorney, either at law or in equity. It is merely a right to the attorney to retain in his possession the property of his client, until his claim for fees and charges has been satisfied, and he cannot actively enforce such lien so as to procure his payment out of such property, in the absence of a statute prescribing a mode.⁹⁸⁶ He cannot sell or otherwise dispose of the property which he has in his possession, and to which his

Weed Sewing Mach. Co. v. Boutelle, 56 Vt. 570, 48 Am. Rep. 181; *Randolph v. Randolph*, 34 Tex. 181.

Weed Sewing Mach. Co. v. Boutelle, 56 Vt. 570, 48 Am. Rep. 181; *Hutchinson v. Howard*, 15 Vt. 544.

Weed Sewing Mach. Co. v. Boutelle, 56 Vt. 570, 48 Am. Rep. 181; *In re Wilson*, 12 Fed. 235; *In re Paschal*, 10 Wall. (U. S.) 493-496; *Ex parte Sterling*, 16 Ves. 258.

Randolph v. Randolph, 34 Tex. 181.

Walker v. Sargeant, 14 Vt. 247.

Bozon v. Bolland, 4 Mylne & C. 354; *Heslop v. Metcalfe*, 3 Mylne & C. 183; *In re Wilson*, 12 Fed. 235; *Terrell v. The B. F. Terry*, 4 Fed. 552; *Compton v. State*, 38 Ark. 601; *McKelvy's Case*, 108 Pa. 615; *Brown v. Bigley*, 3 Tenn. Ch. 618; *McDonald v. Charleston, C. & C. R. Co.*, 93 Tenn. 281; *Gottstein v. Harrington*, 65 Pac. 753.

lien attaches, so as to satisfy his claim.⁹⁸⁷ But under circumstances it will be indirectly enforced by an order of execution.⁹⁸⁸ If, however, the attorney does not assiduously in collecting his fees, the court may order him to deliver up the property upon certain conditions.⁹⁸⁹ The court will not generally order an attorney to deliver up his papers, etc., upon which he has a general lien, without compelling the client to file a bond to secure his fees and costs.

§ 727. How waived or lost.

As an attorney's general lien for fees and disbursements depends upon the attorney's possession of the property, if he was subject to the lien, such lien will be lost if for any reason he voluntarily parts with the possession of such property,⁹⁹¹ even though it was a mistake on his part that

⁹⁸⁷ *McDonald v. Charleston, C. & C. R. Co.*, 93 Tenn. 281; *Colegrave v. Manley*, Turn. & R. 400; *Bozon v. Bolland*, 4 M. & C. 354, 358; *Heslop v. Metcalfe*, 3 Mylne & C. 183; *In re Wilson*, 12 Fed. 235. Thus as was said in *Brown v. Bigley*, 3 Tenn. C. 183: "This is a lien which he cannot actively enforce, and which amounts to a mere right to retain the papers, as against his client, until he is fully paid." And again in *McDonald v. Charleston, C. & C. R. Co.*, 93 Tenn. 281: "The law is that an attorney, in the absence of any contract to that effect, has a general or retaining lien upon all papers of his client which came into his possession in the course of his professional employment. This lien is one in which there is no right of sale. The attorney simply can detain the papers from his client, and the lien is valuable to the extent that the papers are necessary and indispensable to the client, or, as is stated in some of the cases, to the extent that the client can be benefited thereby. It is a lien which cannot be actively enforced, and amounts simply to a mere right to retain the papers until a settlement or payment are made."

⁹⁸⁸ *Greenfield v. New York City*, 28 Hun (N. Y.) 320.

⁹⁸⁹ *McPherson v. Cox*, 96 U. S. 404.

⁹⁹⁰ *Greenfield v. New York City*, 28 Hun (N. Y.) 320; *Clark v. Ham*, 5 Abb. Pr. (N. Y.) 413; *McPherson v. Cox*, 96 U. S. 404. See, also, *In re An Attorney*, 63 How. Pr. 152, 87 N. Y. 152; *In re Jewitt*, 34 Beav. 22.

⁹⁹¹ *Nichols v. Pool*, 89 Ill. 491; *Clark v. Gilbert*, 2 Bing. N. S. 413; *In re Wilson*, 12 Fed. 235; *Oakes v. Moore*, 24 Me. 214, 41 A. 214.

to part with it. So it is lost by his assigning it to another, as it is nonassignable, but is personal to the attorney,⁹⁹² and the attorney cannot regain it by purchasing of the assignee a judgment recovered by the latter on the debt assigned by the attorney.⁹⁹³

However, his relinquishment of possession of the property is effected by the client through fraudulent or unlawful means, his lien will not be lost thereby.⁹⁹⁴ And since possession by an agent is the possession by the principal, the attorney's lien is not lost by transferring possession of the property to his agent, or by transferring to another person to the lien.⁹⁹⁵ Nor does he waive his lien by delivering over, to a receiver duly appointed, the property on which his lien is claimed, where such delivery is accompanied by notice of the lien claimed.⁹⁹⁶

The lien is waived by his taking other security for the debt which are the subject of the lien;⁹⁹⁷ or by taking an assignment of a fund, upon which his lien existed.⁹⁹⁸ But if he takes the client's note or acceptance for the amount of his lien is not extinguished, unless it appears that he intended it, or it was given in payment of such amount.⁹⁹⁹

B. Special or Charging Lien.

3. Definition and nature.

An attorney's special lien is the right of an attorney to charge his fees for services rendered in a certain transaction upon the property recovered by the attorney for his client in such

Stewart v. Flowers, 44 Miss. 518, 7 Am. Rep. 707; *Casey v. ...*, 30 Tex. 184; *Gottstein v. Harrington*, 25 Wash. 508.

In re Wilson, 12 Fed. 235; *Lovett v. Brown*, 40 N. H. 511; *... v. Head*, 1 Mason, 319, Fed. Cas. No. 9,379. See ante, § 719.

Chappell v. Dann, 21 Barb. (N. Y.) 17.

Dicas v. Stockley, 7 Car. & P. 587.

Watson v. Lyon, 7 De Gex, M. & G. 288, 298.

Cory v. Harte, 13 Daly (N. Y.) 147.

Balch v. Symes, 1 Turn. & R. 92; *Cowell v. Simpson*, 16 Ves.

Fulton v. Harrington, 7 Houst. (Del.) 182.

Dennett v. Cutts, 11 N. H. 163; *Stevenson v. Blakelock*, 1 Maule

335.

transaction, where such property is not in the attorney's possession.¹⁰⁰⁰ It is a right to charge his fees for services rendered in procuring a judgment, decree or award, and to the amount of such judgment or decree, and to the amount of such award. It is to be deemed an equitable assignee of the judgment or award. Although the term "lien" has been applied to this right, the attorney has over a judgment recovered by him for his client, it is perhaps an incorrect expression, for what is not a lien in the true sense of that term, but is merely an equitable right to the interference of the court to have a judgment or award held as security for his fees; or in other words it is an equitable right to receive compensation for his services out of the proceeds of a judgment or award which has been obtained by such services.¹⁰⁰² It is

¹⁰⁰⁰ *Weed Sewing Mach. Co. v. Boutelle*, 56 Vt. 570, 48 Am. Rep. 821.

¹⁰⁰¹ *Mitchell v. Oldfield*, 4 Term R. 123; *Turwin v. Gibson*, 720; *In re Wilson*, 12 Fed. 235; *Warfield v. Campbell*, 38 Am. Dec. 724; *Andrews v. Morse*, 12 Conn. 444, 31 Am. Dec. 82; *McDonald v. Napier*, 14 Ga. 89; *Wooten v. Denmark*, 85 Ill. 476, 95 Am. Dec. 446; *W. Humphrey v. Browning*, 46 Ill. 476, 95 Am. Dec. 446; *W. Cobleigh*, 21 N. H. 339; *Ward v. Wordsworth*, 1 E. D. Ser. 598; *Rooney v. Second Ave. R. Co.*, 18 N. Y. 368; *Cou. New York Cent. & H. R. R. Co.*, 71 N. Y. 443, 27 Am. Rep. 47; *Batterman*, 4 Barb. (N. Y.) 47; *Horton v. Champlin*, 1 I. 550, 34 Am. Rep. 722.

¹⁰⁰² *Barker v. St. Quintin*, 12 Mees. & W. 441; *Bozon v. Mylne & C.* 354; *Hough v. Edwards*, 1 Hurl. & N. 171; *Welsh v. Hole*, 1 Doug. 238; *In re Wilson*, 12 Fed. 235; *Ex parte Lehman*, 38 Ala. 631; *Mosely v. Norman*, 74 Ala. 422; *Warfield v. Campbell*, 38 Ala. 527, 82 Am. Dec. 724; *Hobson v. Watson*, 34 Me. 38; *Am. Dec. 632*; *Terney v. Wilson*, 45 N. J. Law, 282; *Ro. Second Ave. R. Co.*, 18 N. Y. 368; *Martin v. Hawks*, 15 Jo. 405; *Stoddard v. Lord*, 36 Or. 412; *Weed Sewing Mach. Co. v. Boutelle*, 56 Vt. 570, 48 Am. Rep. 821.

"An attorney," says Lord Mansfield in *Welsh v. Hole*, 238, "has a lien on the money recovered by his client, for the amount of costs; if the money come to his hands, he may retain the amount of his bill. He may stop it in transitu if he can lay his hands on it. If he apply to the court they will prevent its being paid till his demand is satisfied. I am inclined to go still farther, to hold that, if the attorney give notice to the defendant not to pay till his bill should be discharged, a payment by the de-

an equitable lien, and is supported upon the theory that as the attorney's services and skill produced the judgment, the client should not be permitted to run away with the fruits thereof without first satisfying the legal demands of the attorney, by whose industry, and perhaps at whose expense, those fruits were obtained.¹⁰⁰³ As has been said: Primarily, without doubt, the lien originates in the control which the attorney has by his retainer over the judgment, and the processes for its enforcement. This enables him to collect the judgment, and reimburse himself out of the proceeds. * * * But inasmuch as the attorney has the right, or at least is induced, to rely on his retainer to secure him in this way for his fees and disbursements, he thereby acquires a sort of equity, to the extent of his fees and disbursements, to control the judgment and its incidental processes, against his client and the adverse party colluding with his client, which the court will, in the exercise of a reasonable discretion, protect and enforce. And on the same ground the court will, when it can, protect the attorney in matters of equitable set-off. We think this is the full scope of the lien, if lien it can be called."¹⁰⁰⁴

This special lien must be carefully distinguished from the general lien, which has been treated in the preceding sections. That lien exists for all fees and costs due the attorney by the client for professional services rendered at any time, and in any cause; and also exists only when the attorney has in his possession property which is subject to such a lien. On the other hand this special or charging lien exists only for fees and costs for services rendered in the particular cause in which the judgment, upon which they are a lien, has been rendered. It is not dependent upon possession but extends to property which has been recovered by judgment, by his services, although in another's possession. The failure to distinguish between these two liens has led to an ap-

ter such notice would be in his own wrong, and like paying a debt which has been assigned, after notice."

¹⁰⁰³ Coughlin v. New York Cent. & H. R. R. Co., 71 N. Y. 443, 27 N. Rep. 75; and see cases cited in preceding note 1002.

¹⁰⁰⁴ Horton v. Champlin, 12 R. I. 550, 34 Am. Rep. 722.

parent, though not real, conflict and confusion in the decisions on this subject.¹⁰⁰⁵

§ 729. Fees and charges covered.

There seems to be some conflict among the authorities to what fees or charges this special lien extends to. All authorities agree, however, that it extends only to fees or in the particular case in which the judgment against which it is sought to be enforced was rendered.¹⁰⁰⁶ It does not extend to compensation for services rendered in any other case for the same client. Thus where several actions have been commenced by an attorney for the same client, a judgment in any one of such actions is subject only to a lien for the amount which the attorney is entitled to receive for his services and compensation in the action in which the judgment was recovered.¹⁰⁰⁷

¹⁰⁰⁵ *Hurlbert v. Brigham*, 56 Vt. 372; *Adams v. Fox*, 40 Barb. (N. Y.) 448.

¹⁰⁰⁶ *England*: *Stephens v. Weston*, 3 Barn. & C. 538; *Hodges v. Kelly*, 1 Hogan, 388; *Lucas v. Peacock*, 9 Beav. 177.

United States: *McDougall v. Hazelton Tripod-Boller Co.*, 88 Fed. 217; *In re Wilson*, 12 Fed. 235; *Foster v. Danforth*, 59 Fed. 14; *Massachusetts & S. Const. Co. v. Gill's Creek Tp.*, 48 Fed. 14.

Alabama: *Mosely v. Norman*, 74 Ala. 422; *McWilliams v. Perkins*, 72 Ala. 480; *Jackson v. Clopton*, 66 Ala. 29; *Ex parte Lee*, 59 Ala. 631.

Arkansas: *Porter v. Hanson*, 36 Ark. 591; *Davis v. Webb*, 190 Ark. 190, 74 Am. St. Rep. 81.

Georgia: *McDonald v. Napier*, 14 Ga. 89.

Minnesota: *Forbush v. Leonard*, 8 Minn. 303.

Mississippi: *Pope v. Armstrong*, 3 Smedes & M. 214; *Campbell v. Wilkinson*, 3 Smedes & M. 223.

Nebraska: *Oliver v. Sheeley*, 11 Neb. 521.

New Hampshire: *Wright v. Cobleigh*, 21 N. H. 341.

New York: *Phillips v. Stagg*, 2 Edw. Ch. 108; *Williams v. Gersoll*, 89 N. Y. 508; *Brown v. New York City*, 11 Hun, 21; *Johnson v. E. de Braekeleer & Co.*, 25 Misc. 343; *In re Regan*, 29 N. Y. 527.

Pennsylvania: *In re Aber*, 18 Pa. Super. Ct. 110.

Vermont: *Weed Sewing Mach. Co. v. Boutelle*, 56 Vt. 5; *Am. Rep.* 821.

West Virginia: *Fowler v. Lewis' Adm'r*, 36 W. Va. 112.

¹⁰⁰⁷ *Brown v. New York City*, 11 Hun (N. Y.) 21; *Massachusetts & S. Const. Co. v. Gill's Creek Tp.*, 48 Fed. 145.

But if the several suits are so connected as to form the basis for one judgment or decree, that judgment will be subject to a lien for the fees and charges in those several suits and not only in the particular case in which the judgment was rendered.¹⁰⁰⁸ In such a case the several suits are practically one suit. While this is "a special lien for his services in obtaining the particular judgment or decree only, yet the principles on which it is based obviously extend them to all his services rendered in obtaining the particular judgment or decree, though those services may not all have been rendered in the particular suit in which the judgment or decree was rendered, but were in part rendered in other suits, all tending to and finally ending in the judgment or decree on which the lien is claimed."¹⁰⁰⁹ Thus an attorney was employed by a corporation to manage for it all questions arising involving its right to do business in the city, and in pursuance of this agreement he attended to a number of cases having for their object the establishment of the corporation's right to do business, and secured the reversal of a decree of the lower court enjoining the corporation from doing business, thus finally establishing its right. He then brought suit for the corporation for damages caused by the wrongful issuance of the injunction, and secured judgment. It was held that he had a lien on this judgment, not only for his services in the suit for damages, but also for all services rendered in establishing the corporation's right to do business, all the suits embracing the same matter and being parts of a single litigation, though there were technically several suits.¹⁰¹⁰ Nor need all the services be rendered in the same court.¹⁰¹¹ It is no defense to an attorney's petition

¹⁰⁰⁸ *Renick v. Ludington*, 16 W. Va. 378; *Butchers' Union Slaughter-house & L. S. Landing Co. v. Crescent City Live Stock Landing & S. H. Co.*, 41 La. Ann. 355; *Newbert v. Cunningham*, 50 Me. 231, 10 Am. Dec. 612; *Stoddard v. Lord*, 36 Or. 412; *Blair v. Harrison*, 17 Fed. 257.

¹⁰⁰⁹ *Renick v. Ludington*, 16 W. Va. 390.

¹⁰¹⁰ *Butchers' Union Slaughter-House & L. S. Landing Co. v. Crescent City Live Stock Landing & S. H. Co.*, 41 La. Ann. 355.

¹⁰¹¹ *Weaver v. Cooper*, 73 Ala. 318; *Close v. Shute*, 4 Dem. Surr. (N. Y.) 546.

of a creditor of an insolvent estate, in an administrative suit in equity, to establish a lien on the funds in the hands of the register, that some of the services were rendered by the probate court from which the case was removed to equity.¹⁰¹²

— “Fees,” “costs,” etc. But the confusion, on this subject, exists as to what fees and costs in the particular case constitute a lien on the judgment. In the decisions on this subject a great variety of terms is used, such as “fees,” “costs,” “taxable costs,” “compensation,” and “disbursements,” but it is not always clear what is meant by these terms. In some jurisdictions it is held that the attorney’s lien on a judgment extends only to taxable costs and disbursements in the case, unless there is a statute providing otherwise.¹⁰¹³ In the jurisdictions, then, where this rule prevails, this lien would not extend to commissions or charges, although just in themselves,¹⁰¹⁴ nor to counsel fees or any incidental expenses not taxable.¹⁰¹⁵ On the

¹⁰¹² *Weaver v. Cooper*, 73 Ala. 318.

¹⁰¹³ *Massachusetts & S. Const. Co. v. Gill’s Creek Tp.*, 48 Fed. Ex. parte Kyle, 1 Cal. 331; *Russell v. Conway*, 11 Cal. 93; *Ho Black*, 66 Cal. 41; *Forsythe v. Beveridge*, 52 Ill. 268, 4 Am. Rep. Nichols v. Pool, 89 Ill. 491; *Hill v. Brinkley*, 10 Ind. 102; *F v. Brundage*, 22 Me. 460; *Newbert v. Cunningham*, 50 Me. 2 Am. Dec. 612; *Cooley v. Patterson*, 52 Me. 472 (but see *Strat Hussey*, 62 Me. 286); *Ocean Ins. Co. v. Rider*, 22 Pick. (Mass. Thayer v. Daniels, 113 Mass. 129; *Wells v. Elsam*, 40 Mich. Kinney v. Tabor, 62 Mich. 517; *Frissell v. Halle*, 18 Mo. 18; *R v. Nelson*, 22 Mo. App. 28; *Alexander v. Grand Ave. R. Co.*, 5 App. 66; *Wright v. Cobleigh*, 21 N. H. 339; *Currier v. Boston R. R.*, 37 N. H. 223; *Whitcomb v. Straw*, 62 N. H. 650; *Rowe v. ley*, 49 N. H. 395; *Wells v. Hatch*, 43 N. H. 246; *Braden v. 42 N. J. Law*, 518; *Phillips v. Mackay*, 54 N. J. Law, 319; *Sch v. Oland*, 1 Rich. Law (S. C.) 207; *Miller v. Newell*, 20 S. C. 47 Am. Rep. 833; *Casey v. March*, 30 Tex. 180; *Fowler v. Mon Tex.* 153; *Dutton v. Mason*, 21 Tex. Civ. App. 389; *Heartt v. man*, 2 Aiken (Vt.) 162; *Walker v. Sargeant*, 14 Vt. 247 (b later cases, post, note 1016); *Rice v. Garnhart*, 35 Wis. 282.

¹⁰¹⁴ *Wright v. Cobleigh*, 21 N. H. 339; *Heartt v. Chipman*, 2 (Vt.) 162; *Ocean Ins. Co. v. Rider*, 22 Pick. (Mass.) 210.

¹⁰¹⁵ *Wells v. Hatch*, 43 N. H. 246; *Scharlock v. Oland*, 1 Law (S. C.) 207.

and, in other jurisdictions, it is held or provided that the special lien in favor of an attorney extends, not only to his taxable costs and disbursements in the case, but also to all fees or compensation for services rendered in obtaining judgment.¹⁰¹⁶ If there is an express agreement, that

¹⁰¹⁶ In *re Wilson*, 12 Fed. 235; *Central R. & B. Co. v. Pettus*, 113 S. 116, 127; *Ex parte Lehman*, 59 Ala. 631; *Jackson v. Clopton*, Ala. 29; *Moseley v. Norman*, 74 Ala. 422; *Warfield v. Campbell*, 38 Ark. 527, 82 Am. Dec. 724; *Waters v. Grace*, 23 Ark. 118; *Sexton v. State*, 8 Eng. (Ark.) 193; *Compton v. State*, 38 Ark. 601; *Fillmore v. State*, 10 Colo. 228, 3 Am. St. Rep. 567; *Johnson v. McMillan*, 13 Colo. 423; *Andrews v. Morse*, 12 Conn. 444, 31 Am. Dec. 752; *Cooke v. Thresher*, 51 Conn. 105; *Carter v. Davis*, 8 Fla. 183; *Carter v. Nett*, 6 Fla. 214; *McDonald v. Napier*, 14 Ga. 89; *Morrison v. Anderson*, 45 Ga. 167; *Crowley v. Le Duc*, 21 Minn. 412; *Pope v. Armstrong*, 3 Smedes & M. (Miss.) 214; *Cage v. Wilkinson*, 3 Smedes & M. (Miss.) 223; *Rooney v. Second Ave. R. Co.*, 18 N. Y. 368; *Laughlin v. New York Cent. & H. R. R. Co.*, 71 N. Y. 443, 27 Am. Rep. 75; *Wright v. Wright*, 70 N. Y. 98; *Fox v. Fox*, 24 How. Pr. (N. Y.) 409; *Marshall v. Meech*, 51 N. Y. 140, 10 Am. Rep. 572; *Re Regan*, 167 N. Y. 338; *In re Rowland*, 166 N. Y. 641; *Perkins v. Perkins*, 9 Heisk. (Tenn.) 95; *Pleasants v. Kortrecht*, 9 Heisk. (Tenn.) 694; *Hunt v. McClanahan*, 1 Heisk. (Tenn.) 503; *Wick v. Ludington*, 16 W. Va. 378. And in collecting the same, where the judgment is assigned to the attorney as security for his fees and costs. *Com. v. Terry*, 11 Pa. Super. Ct. 547; *Hooper v. Welch*, 15 Vt. 169, 5 Am. Rep. 265; *Weed Sewing Mach. Co. v. Boutelle*, 56 Vt. 570, 48 Am. Rep. 324. The court in the latter case said: "No valid reason can be given for limiting an attorney's charging lien to that under our law are the taxable costs in favor of his client in the suit. If he is to be given a lien at all upon a judgment recovered by his services, it should be to the extent of the value of his services in the suit. His services are presumed to have been skillfully performed, and valuable because so performed. They enhance the client's claim presumably to the extent of the value of his services, the same as the tailor's services in manufacturing a patron's dress into a coat enhance the value of the materials to the extent of the value of his services. We are aware that the decisions in this country are not uniform on the extent of an attorney's charging lien. In some states it is held to cover his reasonable charges and disbursements in the suit, while in others it is limited to the amount of costs taxable in favor of his client in the suit. But these are what the law allows to be recovered in favor of the prevailing party. They are taxed between party and party, and not

of course determines the amount of compensation, other than it is ascertained upon the basis of a quantum meruit.

Much of this confusion is thought to arise by courts in this country applying the English rule as to an attorney's special lien and failing to distinguish between taxable costs in England and taxable costs here. The taxed costs in England were between the attorney and client, whereas in this country they are between the successful and defeated parties to a suit. In England an attorney's fees are the charges which are actionable, or legally coercible, and are taxed as part of the costs. Hence it was necessary that the attorney's lien applied alone to taxed costs. As there were no other charges cognizable by the courts, it was simply possible to further extend the lien. Attorneys at law in most of our courts are allowed no fees which are taxable as costs, excepting fees in certain cases allowed by statute in some states. They look to contracts made with their clients for remuneration for their services. Hence the rule at common law limiting the attorney's lien to taxed costs should not be strictly applied here, although in principle the rule at common law for taxed costs is the same as ours, allowing attorney's fees to be included in the lien.¹⁰¹⁷

§ 730. What attorney may claim this lien.

As a general rule, only such attorney as is lawfully employed by the client, and appears on the record as such,

between attorney and client, and are in no sense the measure of the value of the attorney's services and disbursements in the suit. They include, frequently, court, clerk, witness and officer's fees in the suit which the client has advanced. I cannot help thinking that a large class of decisions have their origin in not observing the distinction between taxable costs, which at the common law was a taxation between the attorney or solicitor and his client, and taxable costs under our statutes, which is a taxation in favor of the recovery by a party against the defeated party."

In Iowa it is held that prior to Act 18th General Assembly, a plaintiff's attorney had no interest in a judgment in favor of his client for attorney's fees specially contracted for, in the absence of an agreement to that effect. *Barber v. Aultman, Miller & Co.*, 102 Iowa, 278.

¹⁰¹⁷ See *Warfield v. Campbell*, 38 Ala. 527, 82 Am. Dec. 724; *Donald v. Napier*, 14 Ga. 89, 110; *Frissell v. Halle*, 18 Mo. 18.

those services have recovered the judgment, may claim a lien thereon for his fees and charges.¹⁰¹⁸ It is only the attorney who is in charge of the suit at the time judgment is rendered that is entitled to this lien.¹⁰¹⁹ If another attorney had been employed in an earlier part of the case and had withdrawn or another had been substituted in his place, he is not entitled to no lien upon the ultimate recovery in the case, unless a special reason is shown therefor,¹⁰²⁰ or unless a special agreement to that effect had been made with his client.¹⁰²¹ A decree declaring a lien for several attorneys as an entirety is not invalid because one of the attorneys was a non-resident, was not a licensed attorney in the state, nor an attorney of record in the case, where it was shown that he rendered services in the case, and the amount allowed was a reasonable fee for the attorneys of record alone.¹⁰²² Associate counsel employed in a case have no lien, for professional services rendered, upon a judgment recovered thereon,¹⁰²³ unless they have been specially employed by the client, or by the principal attorney with the client's consent.¹⁰²⁴ But the original attorney, in addition to the lien for his own fee, may have a lien for the whole or part of the fee of additional counsel which he has paid, where the client is to pay the whole or a part of such fee.¹⁰²⁵

¹⁰¹⁸ *Compton v. State*, 38 Ark. 601; *Davis v. Sharron*, 15 B. Mon. (Ky.) 64; *McGregor v. Comstock*, 28 N. Y. 237; *Heavenrich v. Albee*, 111 Mich. 163; *People v. Pack*, 115 Mich. 669.

¹⁰¹⁹ *Wells v. Hatch*, 43 N. H. 246, 249.

¹⁰²⁰ *Hektograph Co. v. Fourl*, 11 Fed. 844; *Halbert v. Gibbs*, 16 App. Div. (N. Y.) 126.

¹⁰²¹ *In re Willson*, 12 Fed. 235.

¹⁰²² *Taylor v. Badoux* (Tenn. Ch. App.) 58 S. W. 919.

¹⁰²³ *Brown v. New York City*, 9 Hun (N. Y.) 587; *Kennedy v. Herrick*, 18 Misc. (N. Y.) 38; *Foster v. Danforth*, 59 Fed. 750; *Turned v. Dubuque*, 86 Iowa, 166. Nor for disbursements. *In re Wiley*, 65 App. Div. (N. Y.) 523.

¹⁰²⁴ *Massachusetts & S. Const. Co. v. Gill's Creek Tp.*, 48 Fed. 29; *Jackson v. Cloppon*, 66 Ala. 29; *People v. Pack*, 115 Mich. 669; *Isbaugh v. Frazer*, 19 Pa. 95. And see *Harwood v. La Grange*, 1 N. Y. 538.

¹⁰²⁵ *Louisville & N. R. Co. v. Procter*, 21 Ky. L. R. 447, 51 S. W.

Where several attorneys render services for the common defendant in a suit, they all have an equal right to a lien on the fruits of the judgment, for their disbursements and costs taxed, and, if one of them has taken an assignment of the fruits, he cannot be disturbed in his possession, in favor of any of the others.¹⁰²⁶

§ 731. When this lien attaches.

In the absence of a statute providing otherwise, an attorney's special or charging lien does not attach until the judgment has been recovered by him in his client's favor.

¹⁰²⁶ *Massachusetts & S. Const. Co. v. Gill's Creek Tp.*, 48 Fed. Finance Co. of Pennsylvania v. Charleston, C. & C. R. Co., 48 F.

¹⁰²⁷ *United States: Swanston v. Morning Star Min. Co.*, 121 F. 215; *Sherry v. Oceanic Steam Nav. Co.*, 72 Fed. 565.

Alabama: Mosely v. Norman, 74 Ala. 422; *Jackson v. Clopper*, 29 Ala. 29; *Ex parte Lehman*, 59 Ala. 631.

California: Ex parte Kyle, 1 Cal. 331.

Connecticut: Andrews v. Morse, 12 Conn. 444, 31 Am. Dec.

District of Columbia: Lamont v. Washington & G. R. Mackey, 502, 47 Am. Rep. 268; *Hutchinson v. Worthington*, 1 D. C. 548.

Illinois: Henchey v. Chicago, 41 Ill. 136.

Indiana: Hanna v. Island Coal Co., 5 Ind. App. 163, 51 A. Rep. 236.

Maine: Hobson v. Watson, 34 Me. 20, 56 Am. Dec. 632; *Nichols v. Cunningham*, 50 Me. 231, 79 Am. Dec. 612; *Averill v. Long*, 66 Me. 237; *Potter v. Mayo*, 3 Me. 34, 14 Am. Dec. 211.

Massachusetts: Getchell v. Clark, 5 Mass. 309; *Simmons v. Boardman*, 103 Mass. 33.

Michigan: Voight Brewery Co. v. Donovan, 103 Mich. 190.

Nebraska: Abbott v. Abbott, 18 Neb. 503.

New Hampshire: Young v. Dearborn, 27 N. H. 324; *Webster v. Hatch*, 43 N. H. 246.

New York: Coughlin v. New York Cent. & H. R. R. Co., 100 N. Y. 443, 27 Am. Rep. 75; *Sweet v. Bartlett*, 4 Sandf. 661; *Pulley v. Harris*, 52 N. Y. 73; *Marshall v. Meech*, 51 N. Y. 140, 10 Am. Rep. 572.

Tennessee: Brown v. Bigley, 3 Tenn. Ch. 618.

Utah: Sandberg v. Victor Gold & Silver Min. Co., 18 Utah, 100.

Vermont: Hooper v. Welch, 43 Vt. 169, 5 Am. Rep. 267; *Sewing Mach. Co. v. Boutelle*, 56 Vt. 570, 48 Am. Rep. 821; *Finch v. Ineson v. Howard*, 15 Vt. 544; *Foot v. Tewksbury*, 2 Vt. 97.

Wisconsin: Courtney v. McGavock, 23 Wis. 622.

and although a judgment does not properly exist until it has been properly rendered and entered, yet for the purposes of the attorney's lien it exists from the time it has been rendered to be entered. Thus an order, after verdict, that judgment be entered on the verdict will be sufficient judgment for the lien to attach to.¹⁰²⁸

Before judgment, in the absence of agreement or statute, the attorney has no interest in his client's cause of action that will give him a lien thereon. And if the cause of action in its nature non-assignable the party owning it cannot by any agreement give his attorney any interest therein. "Still by agreement to divide the recovery in such a case would attach itself to the judgment when recovered, and give the attorney an equitable interest therein."¹⁰²⁹ Thus, where the claim is for personal injuries, or for unliquidated damages, it is non-assignable, and the attorney cannot get a vested interest therein, and hence can have no lien, even for tax-expenditure costs, before judgment.¹⁰³⁰ And the same is true in case of an action for slander, or libel, or assault and battery.¹⁰³¹ But if the cause of action before judgment be in its nature assignable, the owner of it may assign and, by agreement, create legal and equitable interests therein and such agreements may now be made with his attorneys as well as with other persons, and when such interests have been created and notice given of them they must be respected.¹⁰³² In some states there are express statutory provisions giving the attorney a lien on the client's cause of action from the time the suit is instituted.¹⁰³³

¹⁰²⁸ *Young v. Dearborn*, 27 N. H. 324.

¹⁰²⁹ *Coughlin v. New York Cent. & H. R. R. Co.*, 71 N. Y. 443, 27 N. Y. Rep. 75; *Pulver v. Harris*, 52 N. Y. 73; *Williams v. Ingersoll*, N. Y. 508.

¹⁰³⁰ *Kusterer v. Beaver Dam*, 56 Wis. 471, 43 Am. Rep. 725; *Voell v. Kelly*, 64 Wis. 504; *Henchey v. Chicago*, 41 Ill. 136.

¹⁰³¹ *Miller v. Newell*, 20 S. C. 123, 47 Am. Rep. 833; *Quincey v. Francis*, 5 Abb. N. C. (N. Y.) 286.

¹⁰³² *Coughlin v. New York Cent. & H. R. R. Co.*, 71 N. Y. 443, 27 N. Y. Rep. 75; *Newell v. West*, 149 Mass. 520; *Harshman v. Armstrong*, 119 Ind. 224.

¹⁰³³ The New York Code of Civil Procedure, § 66, provides: "The compensation of an attorney or counsellor for his services is gov-

§ 732. Effect of settlement by client.

(a) Before judgment.—As has been seen, in the of statute, an attorney has no interest in his client's of action before judgment. In the absence of such a therefore, a client may before judgment, in good faith or compromise his case with the opposing party, n standing the attorney's claim for compensation;¹⁰³

earned by agreement, express or implied, which is not restr law. From the commencement of an action or special pro or the service of an answer containing a counterclaim, the a who appears for a party has a lien upon his client's cause of claim or counterclaim, which attaches to a verdict, report, d judgment or final order in his client's favor." In construe this statute see *Jones v. Easton*, 11 Abb. N. C. (N. Y.) 114; *v. Smith*, 92 Hun, 536; *Bevins v. Albro*, 86 Hun, 590; *Long Carter*, 88 Hun, 513; *In re Regan*, 29 Misc. 527; *Fischer-Ha Brooklyn Heights R. Co.*, 173 N. Y. 492; *White v. Sumner*, Div. 70. Under this statute, an attorney for a defendant acquire any lien in the action where the answer he served contained no counterclaim. *Fromme v. Union Surety & G Co.*, 39 Misc. (N. Y.) 105.

So the Kentucky Code of Practice, § 407, provides: "T orneys at law shall have a lien upon any choses in action, s or other claim or other demand put into his or their hands or collection, and upon judgments in actions prosecuted by them to recovery, where the judgment is for money, for the of any fee which may reasonably have been agreed on by t ties, or, in the absence of such agreement, for a fair and able fee for the services of such attorney." See *Robertson v 9 Bush* (Ky.) 659.

And in Georgia under section 1989 of the code it is held t attorney's claim of lien arises upon his employment, and fected by the ultimate recovery of a judgment for his cli record of his lien, and binds the property so recovered as the owners and all others, save only bona fide purchasers notice. *Lovett v. Moore*, 98 Ga. 158. See, also, *Tenn. Acts 243, § 1*; *Illinois Cent. R. Co. v. Wells*, 104 Tenn. 706, holdi such an act is not unconstitutional because it does not prov method for the enforcement of the lien declared.

¹⁰³⁴ *United States*: *Swanson v. Chicago, St. P. & K. C. R. Fed.* 638; *The Bella*, 91 Fed. 540; *Purcell v. Lincoln*, 1 S Fed. Cas. No. 11,471; *Emma Silver Min. Co. v. Emma Silv Co.*, 12 Fed. 815.

ough the client has agreed to give the attorney part of the proceeds of the judgment as his compensation,¹⁰⁸⁵ or has

Alabama: Tillman v. Reynolds, 48 Ala. 365; Connor v. Boyd, 73 385.

Arkansas: De Graffenreid v. St. Louis S. W. R. Co., 66 Ark. 260.

California: Funded Debt of San Jose v. Younger, 29 Cal. 147, 87 Dec. 168.

District of Columbia: Lamont v. Washington & G. R. Co., 2 Mackey, 502, 47 Am. Rep. 268.

Georgia: Harris v. Tison, 63 Ga. 629, 36 Am. Rep. 126; Jones v. Gan, 39 Ga. 310, 99 Am. Dec. 458; Green v. Southern Exp. Co., Ga. 20; Brown v. Georgia, C. & N. R. Co., 101 Ga. 80. But see note 1042.

Idaho: Pence v. Sweeney, 3 Idaho, 181.

Illinois: Henchey v. Chicago, 41 Ill. 136.

Indiana: Koons v. Beach, 147 Ind. 187; Hanna v. Island Coal Co., Ind. App. 163, 51 Am. St. Rep. 246.

Iowa: Ellwood v. Wilson, 21 Iowa, 523; Casar v. Sargent, 7 Iowa,

Kentucky: Wathen v. Russell, 20 Ky. L. R. 709, 47 S. W. 437; and v. Anders, 5 Bush, 601; Rowe v. Fogle, 88 Ky. 105.

Maine: Hobson v. Watson, 34 Me. 20, 56 Am. Dec. 632; Potter v. o, 3 Me. 34, 14 Am. Dec. 211; Averill v. Longfellow, 66 Me. 237.

Massachusetts: Getchell v. Clark, 5 Mass. 309; Simmons v. Al- 103 Mass. 33.

Michigan: Parker v. Blighton, 32 Mich. 266; Wright v. Hake, 38 h. 525; Voight Brewery Co. v. Donovan, 103 Mich. 190.

Minnesota: Anderson v. Itasca Lumber Co., 86 Minn. 480.

Mississippi: Mosely v. Jamison, 71 Miss. 456.

Nebraska: Sheedy v. McMurtry, 44 Neb. 499.

New Hampshire: Wells v. Hatch, 43 N. H. 246; Young v. Dear- n, 27 N. H. 324.

New Jersey: Gregory v. Gregory, 32 N. J. Eq. 424; Helster v. unt, 17 N. J. Law, 438.

New York: Coughlin v. New York Cent. & H. R. R. Co., 71 N. Y. 27 Am. Rep. 75; Wright v. Wright, 70 N. Y. 96; Randall v. Van genen, 115 N. Y. 527, 12 Am. St. Rep. 828; Lee v. Vacuum Oil Co., N. Y. 579; Poole v. Belcha, 131 N. Y. 200. And see Nichols' Y. Pr. § 353; II. Columbia Law Review, p. 449.

See Lamont v. Washington & G. R. Co., 2 Mackey (D. C.) 502, 47 . Rep. 268; Coughlin v. New York Cent. & H. R. R. Co., 71 N. Y. 27 Am. Rep. 75; Lee v. Vacuum Oil Co., 126 N. Y. 579; Miller v. well, 20 S. C. 122, 47 Am. Rep. 833; Kusterer v. Beaver Dam, 56 h. 471, 43 Am. Rep. 725; Courtney v. McGavock, 23 Wls. 619.

agreed not to compromise the case.¹⁰³⁶ Such a settlement, compromise, however, must be made in good faith, and without any intention of depriving the attorney of his compensation. If such settlement is made collusively, for the purpose of defrauding the attorney, the courts have been accustomed to intervene, and protect the attorney by permitting him to proceed with the suit for the purpose of collecting his compensation, or by allowing him to recover the amount due him, from one of the parties.¹⁰³⁷ A proctor, who commenced a suit for a seaman, upon a just claim, although the parties make a settlement without his knowledge, may

Ohio: Connell v. Brumback, 18 Ohio Circ. R. 502, in the absence of notice to retain the attorney's share.

South Carolina: Miller v. Newell, 20 S. C. 123, 47 Am. R.

Tennessee: Johnson v. Story, 1 Lea, 114; Covington v. L. Tenn. 496; Carden v. Carden (Tenn. Ch. App.) 37 S. W. 10.

Texas: Whittaker v. Clarke, 33 Tex. 647.

Vermont: Hutchinson v. Pettes, 18 Vt. 614; Weed Sewing Co. v. Boutelle, 56 Vt. 570, 48 Am. Rep. 821; Hooper v. Welch, 169, 5 Am. Rep. 267.

Wisconsin: Kusterer v. Beaver Dam, 56 Wis. 471, 43 Am. 725.

West Virginia: McCoy v. McCoy, 36 W. Va. 772.

¹⁰³⁶ Hanna v. Island Coal Co., 5 Ind. App. 163, 51 Am. S. 246; Mosely v. Jamison, 71 Miss. 456.

¹⁰³⁷ Swain v. Senate, 2 Bos. & P. (N. R.) 99; Cole v. Ber Price, 15; Morse v. Cooke, 13 Price, 473; Patrick v. Leach, 476; McDonald v. Napier, 14 Ga. 89; Jones v. Morgan, 39 Ga. Am. Dec. 458; North Chicago St. R. Co. v. Ackley, 58 Ill. App. Hubble v. Dunlap, 19 Ky. L. R. 656, 41 S. W. 432; Carper Myers, 90 Mich. 209; Weeks v. Wayne Circuit Judges, 78 Mich. Aspinwall v. Sabin, 22 Neb. 73, 3 Am. St. Rep. 258; Barn Holmes, 115 Iowa, 581; Young v. Dearborn, 27 N. H. 324; v. Mount, 17 N. J. Law, 438; Barnes v. Taylor, 30 N. J. E. Randall v. Van Wagenen, 115 N. Y. 527, 12 Am. St. Rep. Coughlin v. New York Cent. & H. R. R. Co., 71 N. Y. 443, Rep. 75; McBratney v. Rome, W. & O. R. Co., 87 N. Y. 467; v. Town of Osceola, 22 Wis. 453; Voell v. Kelly, 64 Wis. 504; ney v. McGavock, 23 Wis. 619 (holding there must be no fraudulent intent of both parties).

for costs.¹⁰³⁸ And it has been held that if the client promises the case before its final termination, without knowledge or consent of his attorney, although done in good faith, the attorney's lien will attach to the amount due on the compromise;¹⁰³⁹ but, in such case, the attorney's lien will not be enforced against the debtor or his property for a larger sum than that due to their client under the compromise.¹⁰⁴⁰ There have been but few cases in which an attorney for the defendant has questioned the right of his client to settle or dismiss his defense; and an agreement to defend an action and receive for his compensation the costs recoverable from the plaintiff, does not give an attorney an interest in the action as will prevent a discontinuance without costs.¹⁰⁴¹

— **By statute.** But in some of the states, under the statute, the attorney's inchoate lien is protected from the time of the institution of the suit by him.¹⁰⁴² Thus where, in an

¹⁰³⁸ *Angell v. Bennett*, 1 Spr. 85, Fed. Cas. No. 387; *The Planet*, 11, Fed. Cas. No. 11,204; *Collins v. Nickerson*, 1 Spr. 126, Fed. No. 3,016.

¹⁰³⁹ *Covington v. Bass*, 88 Tenn. 496 (during suspension by appointment); *Pleasants v. Kortrecht*, 5 Heisk. (Tenn.) 694; *Twiggs v. Chambers*, 56 Ga. 279 (before trial); *Illinois Cent. R. Co. v. Wells*, 104 Tenn. 706; *Fenwick v. Mitchell*, 34 Misc. (N. Y.) 617.

¹⁰⁴⁰ *Covington v. Bass*, 88 Tenn. 496.

¹⁰⁴¹ *Garvin v. Crowley*, 116 Wis. 496. And see *Morrison v. Green*, 104 Ga. 754; *Fry v. Calder*, 74 Ga. 7.

¹⁰⁴² *Stockton Sav. & Loan Soc. v. Donnelly*, 60 Cal. 481; *Johnson v. McCurry*, 102 Ga. 471; *Florida Cent. & P. R. Co. v. Ragan*, 104 Ga. 353; *Twiggs v. Chambers*, 56 Ga. 279; *Coleman v. Ryan*, 58 Ga. 353; *Ferry v. Davidson*, 44 Kan. 377; *Robertson v. Shutt*, 9 Bush (Ky.) 659; *Rowe v. Fogle*, 88 Ky. 105; *Illinois Cent. R. Co. v. Wells*, 104 Tenn. 706; *Tompkins v. Nashville, C. & St. L. R. Co.*, 110 Tenn. 353; *Smelker v. Chicago & N. W. R. Co.*, 106 Wis. 135.

The New York statute provides that this "lien cannot be affected by any settlement between the parties before or after judgment or order." New York Code Civ. Proc. § 66; *Hart v. City of New York*, 139 N. Y. 610; *Fenwick v. Mitchell*, 34 Misc. (N. Y.) 617; *Belcher v. Belcha*, 131 N. Y. 200; *Lee v. Vacuum Oil Co.*, 126 N. Y. 521; *Peri v. New York Cent. & H. R. R. Co.*, 152 N. Y. 521; *Vrooman v. Lockering*, 25 Misc. (N. Y.) 277; *Bollar v. Schoenwirth*, 30 Misc. (N. Y.) 224. And see *Nichols' N. Y. Pr.* § 353. But if there was

action to recover property, there is a special contract between the attorney and the client, by which the attorney's fees to be paid out of the proceeds of the suit. The attorney has an inchoate lien upon the property for his fees as soon as the suit is commenced; and the client cannot deprive the attorney of such right by dismissing the action before trial, or by the attorney's objection, without first paying or properly satisfying the attorney's fees.¹⁰⁴³

But even under such statutes the client is not prevented from effecting a settlement of the case, if the attorney's lien is not thereby prejudiced, but his lien is carried along with the cause of action by the settlement merges into the settlement agreed upon in settlement. If a judicial recovery is obtained, the lien attaches to that; if a compromise agreement is made, the lien attaches to that; and in each case, the attorney's interest is such that it cannot be defeated or satisfied by a voluntary payment to his client without his consent.¹⁰⁴⁴ If the plaintiff should honestly settle for nothing, the cause of action would be extinguished; and the lien also, for there would be nothing left for it to attach to.¹⁰⁴⁵

Under the New York statute it is held that by an agreement of settlement between the parties before judgment the cause of action is extinguished, the effect of the statute being merely to continue the lien on the fund paid in settlement, and not that plaintiff's attorney is not entitled to have the action continued to judgment against defendant to recover the amount of his fee, though, had the settlement been fraudulent and

no "verdict, report, decision, judgment or final order" to which the attorney's lien could attach at the settlement, the attorney cannot bring an action against the parties for destroying the cause of action; but, with leave of the court, he may under the above statute, prosecute the original action to enforce his lien, and he need not show that the settlement was fraudulent. *McCabe v. Fogg*, 60 How. Pr. (N. Y.) 488; *Wilber v. Baker*, 12 N. Y. 24; *Tullis v. Bushnell*, 12 Daly (N. Y.) 217.

¹⁰⁴³ *Twiggs v. Chambers*, 56 Ga. 279; *Stockton Sav. & L. Co. v. Donnelly*, 60 Cal. 481; *Skaggs v. Hill*, 12 Ky. L. R. 382, 100 363. And see *Lavender v. Atkins*, 20 Neb. 206.

¹⁰⁴⁴ See cases cited in note 1042, *supra*.

¹⁰⁴⁵ *Illinois Cent. R. Co. v. Wells*, 104 Tenn. 706.

¹⁰⁴⁶ *Fenwick v. Mitchell*, 34 Misc. (N. Y.) 617.

torney, the rule would be otherwise.¹⁰⁴⁷ "The client having the absolute right of settlement, it must follow that the attorney's lien on the cause of action is subject to such right. The attorney is subject to his client, and his lien to all the prudences, fears, necessities, and so on, of his client which may induce him to compromise and settle. The cause of action merges in the settlement. There is then no cause of action left for the attorney's lien to attach to. His lien is terminated by the settlement. The amount agreed to be paid in settlement is then all that his lien covers. If nothing is to be paid in settlement his lien is gone. To say that an attorney for the plaintiff can repudiate such settlement, and harass the defendant by going on with the action in order to see if he cannot by obtaining a judgment create a fund, a larger fund than the amount agreed to be paid in settlement, for his lien to reach, is equivalent to saying that the defendant cannot settle the cause of action with the plaintiff without the attorney's consent; and that is not so."¹⁰⁴⁸

But the Georgia statute gives a lien upon the suit only, and not the cause of action, and expressly gives attorneys power over the suit to enforce their liens; and it is held under this statute that the client cannot settle and dismiss his suit, over the objections of his attorney, without paying him his charges, and if he attempts to do so, the attorney may proceed with the suit to recover his fees.¹⁰⁴⁹ But under this statute the attorney's lien does not arise until after service of process, and actual notice of the filing of the suit, and notice will have no effect on a settlement made before that time.¹⁰⁵⁰

¹⁰⁴⁷ *Dolliver v. American Swan Boat Co.*, 32 Misc. (N. Y.) 264; *Tri v. New York Cent. & H. R. R. Co.*, 152 N. Y. 521; *Schriever v. Brooklyn Heights R. Co.*, 49 App. Div. (N. Y.) 629; *Fenwick v. Mitchell*, 34 Misc. (N. Y.) 617; *Young v. Howell*, 64 App. Div. (N. Y.) 246; to same effect, *Illinois Cent. R. Co. v. Wells*, 104 Tenn. 706.

¹⁰⁴⁸ *Schriever v. Brooklyn Heights R. Co.*, 30 Misc. (N. Y.) 147.

¹⁰⁴⁹ *Twiggs v. Chambers*, 56 Ga. 279; *Johnson v. McCurry*, 102 Ga. 382; *Walker v. Equitable Mortg. Co.*, 114 Ga. 862; *Little v. Sexton*, 101 Ga. 411. And see *Brown v. Georgia, C. & N. R. Co.*, 101 Ga. 80.

¹⁰⁵⁰ *Florida Cent. & P. R. Co. v. Ragan*, 104 Ga. 353.

(b) **After judgment.**—As has been seen in a previous section, an attorney's special lien attaches as soon as judgment has been recovered by him for his client. If the lien has thus attached, it cannot be defeated or avoided by a subsequent settlement or compromise between the attorney and the client with notice of such lien; and notwithstanding such settlement or compromise the attorney may enforce such judgment, at least to the extent of his lien, or recover from any other party who has settled with notice.¹⁰⁵¹ And a plaintiff

¹⁰⁵¹ *United States*: *Foster v. Danforth*, 59 Fed. 750.

Arkansas: *Davis v. Webber*, 66 Ark. 190, 74 Am. St. Rep. 16.

Colorado: *Johnson v. McMillan*, 13 Colo. 423; *Flint v. H. 16 Colo. App.* 464.

Connecticut: *Andrews v. Morse*, 12 Conn. 444, 31 Am. Dec. 16.

Georgia: *McDonald v. Napier*, 14 Ga. 89.

Iowa: *Fisher v. Oskaloosa*, 28 Iowa, 381; *Wallace v. Chicago & St. P. R. Co.*, 112 Iowa, 565; *Parsons v. Hawley*, 92 Iowa, 166; *Larned v. Dubuque*, 86 Iowa, 166; *Brainard v. Elwood*, 53 Iowa, 166.

Kentucky: *Louisville & N. R. Co. v. Proctor*, 21 Ky. L. R. 591; *Stephens v. Farrar*, 4 Bush, 13.

Louisiana: *Safford v. Carroll*, 23 La. Ann. 382.

Maine: *Cooly v. Patterson*, 52 Me. 472; *McKenzie v. Ward*, 62 Me. 136; *Stratton v. Hussey*, 62 Me. 286.

Minnesota: *Lindholm v. Itasca Lumber Co.*, 64 Minn. 46.

New Jersey: *Braden v. Ward*, 42 N. J. Law, 518; *Barnes v. 30 N. J. Eq.* 467.

New York: *Bailey v. Murphy*, 136 N. Y. 50; *Roberts v. Union R. Co.*, 84 Hun, 437; *Rooney v. Second Ave. R. Co.*, 18 N. Y. 165; *Pinder v. Morris*, 3 Caines, 165; *Stilwell v. Armstrong*, 28 Mich. 165.

South Carolina: *Scharlock v. Oland*, 1 Rich. Law, 207.

South Dakota: *Leighton v. Serveson*, 8 S. D. 350.

Tennessee: *Covington v. Bass*, 88 Tenn. 496.

Vermont: *Hutchinson v. Pettes*, 18 Vt. 614; *Hooper v. 16 Vt.* 169, 5 Am. Rep. 268.

Washington: *Wooding v. Crain*, 11 Wash. 207.

Wisconsin: *Renick v. Ludington*, 16 W. Va. 378. *Compaschell v. Clark*, 5 Mass. 309.

In *Pleasants v. Kortrecht*, 85 Heisk. (Tenn.) 694, the court said: "But it is argued that the solicitor's lien does not attach until the thing or matter in litigation is recovered as the result of the litigation. We cannot appreciate the force of this argument. We know that whenever the solicitor has succeeded, by his professional services, in securing a fund by attachment, and thereby fixing upon the lien of his client, his own lien like that of his client attaches to the fund." *Id.*

not insist upon the attorney's withdrawal from the case as to defeat his lien, after the latter has secured a judgment, and pending a writ of error.¹⁰⁵²

But the judgment must have been a final one. If an appeal taken on a judgment below, and is reversed, after which the parties compromise the case, the attorney's lien does not attach to the amount of the compromise unless the defendant be clearly shown to have had notice of it.¹⁰⁵³ So where defendant, in an action on a covenant, makes default by failure to appear, but the parties settle the suit before the judgment is entered, the attorney for the plaintiff cannot claim his lien.¹⁰⁵⁴ And where a case had been reserved after the court had given its opinion in favor of the plaintiff, who assigned his interest in the judgment, and the defendant before judgment was entered during the term paid the whole amount to the assignee; there being no intention to defraud the attorney, his lien was defeated.¹⁰⁵⁵

But although an attorney's lien will not be affected by release of the judgment and the court may interfere to protect the attorney, yet a judgment will not be kept alive, after a release, unless it is necessary to protect the attorney. Therefore, in order that the court may justifiably disregard such a settlement in order to protect the attorney, the lien must have been asserted, and it must be shown that to give full effect to such a settlement would work a fraud upon the attorney or act to his prejudice by depriving him

of it, however, subject to be defeated by the loss of the fund on appeal hearing or trial. *Prima facie*, the fund attached is subject to be appropriated to the satisfaction of the attaching creditor's lien, as well as along with his lien that of his solicitor goes *pari passu*. We hold that from the relation thus existing between complainant and his solicitors, it is a fraud upon their rights for him to make any arrangements or compromise with the opposite party without the knowledge or consent of his solicitors, by which their rights are defeated."

¹⁰⁵² Dodge v. Schell, 20 Blatchf. 517, 12 Fed. 515.

¹⁰⁵³ Pulver v. Harris, 52 N. Y. 73; Dunlap v. Burnham, 38 Me. 112; Melly v. Jamison, 71 Miss. 456; Platt v. Jerome, 19 How. (U. S.) 1. Compare Winslow v. Central Iowa R. Co., 71 Iowa, 197.

¹⁰⁵⁴ Hooper v. Welch, 43 Vt. 169, 5 Am. Rep. 267.

¹⁰⁵⁵ Potter v. Mayo, 3 Me. 34, 14 Am. Dec. 211.

of his costs or by putting them into the hands of an irresponsible client.¹⁰⁵⁶

§ 733. To what this lien attaches.

(a) **In general.**—An attorney's special or charging lien attaches to a judgment or award recovered by him for his client as to the property or proceeds of such judgment or award, whether in his client's hands or in the possession of another.¹⁰⁵⁷ Thus this lien attaches to a fund recovered in the hands of an adverse party;¹⁰⁵⁸ but, in the absence of such recovery, it does not attach to the subject-matter of the suit or controversy before it is recovered by judgment.¹⁰⁵⁹ Nor does it attach to a fund or property which the attorney was not instrumental in creating or recovering.¹⁰⁶⁰ In Illinois, however, in the absence of an express contract out of which a equitable assignment arises, an attorney at law has a lien for his compensation upon the judgment or decree rendered in a suit prosecuted by him, or upon the real estate, mortgage fund or other property recovered by means of his legal services and skill.¹⁰⁶¹

¹⁰⁵⁶ *Poole v. Belcha*, 131 N. Y. 200; *Young v. Howell*, 64 App. Div. (N. Y.) 246.

¹⁰⁵⁷ *In re Wilson*, 12 Fed. 235; *Mackall v. Willoughby*, 16 N. D. 681; *Colorado State Bank v. Davidson*, 7 Colo. App. 91; *Henson v. Worthington*, 7 App. D. C. 548; *Willoughby v. Mackall*, D. C. 162; *Noftzger v. Moffett*, 63 Kan. 354; *Lindner v. H. Mich.* 511; *Kennedy v. Steele*, 35 Misc. (N. Y.) 105; *Woolf v. 45 N. Y. Super. Ct.* 583; *Gates v. De La Mare*, 142 N. Y. 30; *derson v. E. De Brackeler & Co.*, 25 Misc. (N. Y.) 343; *In re 51 App. Div. (N. Y.)* 350; *In re Rowland*, 55 App. Div. 66, N. Y. 641; *McLean v. Lerch*, 105 Tenn. 693; *Loofbourow v. H. Utah*, 49.

¹⁰⁵⁸ *Smith v. Chicago, R. I. & P. R. Co.*, 56 Iowa, 720; *H. Southwestern Mut. Benev. Ass'n*, 45 Kan. 462; *Noftzger v. 63 Kan.* 354; *Braden v. Ward*, 42 N. J. Law, 518; *Clark v. S. 3 N. D.* 280.

¹⁰⁵⁹ *McWilliams v. Jenkins*, 72 Ala. 480; *Higley v. Wh. Ala.* 604; *Fowler v. Lewis' Adm'r*, 36 W. Va. 12; *Phillips v. 63 Neb.* 192.

¹⁰⁶⁰ *Schmertz v. Hammond*, 51 W. Va. 408.

¹⁰⁶¹ *Story v. Hull*, 143 Ill. 506; *Humphrey v. Browning*, 476; *Forsythe v. Beveridge*, 52 Ill. 268; *La Framboise v. G.*

(b) **On a fund in court.**—Where an attorney has rendered professional services for his client, by reason of which a fund has been brought into court, although the attorney has not what might be technically called a lien thereon, yet he is regarded as the equitable owner of the fund to the extent of the reasonable value of his services, and charges, and the court administering the fund may award him his fees out of such fund.¹⁰⁶² As was said by the court in a Federal case: "We have no doubt of the power of the court, where the fund is within its control, * * * to take care of the rights of the solicitors who have claims against it, whether for their costs, technically speaking, or their reasonable counsel fees. We can regard them in no other light than as rightful assignees of a part interest."¹⁰⁶³ So a trust fund or estate is chargeable with all necessary expenses incurred in its management or protection, and hence is chargeable, by a decree in equity, with fees of counsel, employed for the beneficiary or trustee.¹⁰⁶⁴ But it must always be shown that it was through the attorney's services that the fund, out of which he claims payment, was brought into or under the control of the court.¹⁰⁶⁵

1897; *Nichols v. Pool*, 89 Ill. 491; *Sanders v. Sellye*, 128 Ill. 631; *Merion v. Boeger*, 200 Ill. 84, 93 Am. St. Rep. 165.

¹⁰⁶² *Adams v. Kehlor Mill. Co.*, 38 Fed. 281; *Tuttle v. Clafin*, 86 Ill. 964; *Harrison v. Perea*, 168 U. S. 311; *Strong v. Taylor*, 82 Ill. 213; *Merchants' Nat. Bank v. Armstrong*, 107 Ga. 479; *In re* *Essex*, 51 App. Div. (N. Y.) 350; *Byrnes v. Cincinnati*, 7 Ohio Dec. 487; *Wood v. Biddle*, 7 Ohio N. P. 225; *Com. v. Order of Solon*, 192 Ill. 487; *McKelvy & Sterrett's Appeal*, 108 Pa. 615; *Spencer's Appeal* (Pa.) 9 Atl. 523; *Bristol-Goodson Elec. L. & P. Co. v. Bristol*, 99 E. L. & P. Co., 99 Tenn. 371; *Bank of Blount County v. Smith* (Tenn. Ch. App.) 48 S. W. 296; *Campbell v. Provident Sav. & Loan* (Tenn. Ch. App.) 61 S. W. 1090; *Weigand v. Alliance Supply*, 44 W. Va. 133.

¹⁰⁶³ *Ex parte Plitt*, 2 Wall. Jr. 453, Fed. Cas. No. 11,228.

¹⁰⁶⁴ *Central R. & B. Co. v. Pettus*, 113 U. S. 116; *Trustees v. Abend*, 105 U. S. 527; *Abend v. Endowment Fund Commission*, 113 Ill. 96; *Justice v. Justice*, 115 Ind. 201; *Stone v. Wilson's Assignees*, 22 Ky. L. R. 190, 56 S. W. 817; *Merrick v. Bonness*, 66 Ill. 135.

¹⁰⁶⁵ *Com. v. Mechanics' M. F. Ins. Co.*, 122 Mass. 421; *Moses v. Lee Bank*, 1 Lea (Tenn.) 414.

Where land is sold under a bill for partition filed by an attorney for one of the co-owners, he will not be entitled to a lien upon the whole fund realized from such sale, but only on his client's share.¹⁰⁶⁶ And so in case of a sale by the creditors of an insolvent estate, the attorneys of certain creditors cannot claim their compensation out of the whole fund for distribution, though it was made available by their professional services, but only upon the share due his client.

(c) **When on land.**—There is some conflict among the authorities as to the application of an attorney's special lien where land is the subject of the judgment recovered by the attorney for his client. It seems to be the general rule, however, that, in the absence of a statute allowing it, an attorney has no special lien on the land of his client for his fees rendered in recovering it.¹⁰⁶⁸ Other decisions,

¹⁰⁶⁶ *Habberton v. Habberton*, 156 Ill. 444; *Keith v. Fitzhugh*, 106 Ky. 49; *Martin v. Kennedy*, 83 Ky. 344; *Baltimore & O. Co. v. Brown*, 79 Md. 442; *Neblett v. Neblett*, 70 Miss. 572; *Conner v. Ingersoll*, 20 Barb. (N. Y.) 541; *Brown's Estate*, 131 Pa. 481.

¹⁰⁶⁷ *Rives v. Patty*, 74 Miss. 381.

¹⁰⁶⁸ *Alabama*: *McCullough v. Flournoy*, 69 Ala. 189; *McWaters v. Jenkins*, 72 Ala. 480; *Higley v. White*, 102 Ala. 604.

Arkansas: *Hanger v. Fowler*, 20 Ark. 667. Under the Arkansas statute there must be an actual recovery. *Greer v. Ferguson*, 3 Ark. 324; *Hershy v. Du Val*, 47 Ark. 86; *Lane v. Hallum*, 3 Ark. 385; *Porter v. Hanson*, 36 Ark. 591; *Gibson v. Buckner*, 65 Ark. 80; *Gladney v. Rush*, 68 Ark. 80.

Colorado: Gen. St. Colo. § 85; *Fillmore v. Wells*, 10 Colo. 100; *Am. St. Rep.* 567.

District of Columbia: *Willoughby v. Mackall*, 5 App. D. C. 100.

Georgia: The Georgia statute provides that: "Upon all suits for the recovery of real or personal property and upon all judgments and decrees for the recovery of the same, attorneys at law shall have a lien on the property for their fees." Code Georgia, § 1983. *Ten v. Denmark*, 85 Ga. 578; *Wilson v. Wright*, 72 Ga. 848.

Illinois: *Humphrey v. Browning*, 46 Ill. 476, 95 Am. Dec. 100.

Mississippi: *Martin v. Harrington*, 57 Miss. 208; *Stewart v. ...*, 44 Miss. 513, 7 Am. Rep. 707.

New York: Under the New York Code Civ. Proc. § 66, it provides that the lien of an attorney shall attach to the "judgment in his client's favor, and to the proceeds thereof in whose hands they may come," an attorney who represents a landowner in a proceeding to condemn land has no lien on the land itself.

er, hold that the attorney has such a lien on land recovered
his client through his services.¹⁰⁶⁹

McNulty, 5 Misc. 334); but he has where the land is recovered
him. See post, note 1069. And see Deering v. Schreyer, 58 App.
322.

Rhode Island: Cozzens v. Whitney, 3 R. I. 79.

Vermont: Smalley v. Clark, 22 Vt. 598.

West Virginia: Fowler v. Lewis' Adm'r, 36 W. Va. 112; Hogg v.
ver, 36 W. Va. 200; McCoy v. McCoy, 36 W. Va. 772.

The appellants' counsel," said the court in *Martin v. Harrington*,
Miss. 209, "cite no authority in which a lien on real estate, re-
covered through the efforts of an attorney, is recognized. Our own
searches have led us to only two. The first is *Barnesley v.*
Well, 1 Amb. 102. In that case, although Lord Hardwicke stated
general terms that an attorney recovering an estate for his client
is entitled to a lien on it for his costs, yet he allowed the lien
expressly on the ground that the client was a lunatic, that his com-
mittee had a lien on the estate for expenses incurred in the litiga-
tion, and that the attorney was entitled to be subrogated to this
lien of the committee. The other case is *Wilson v. Hood* (3 Hurl.
148), in which the lien was enforced in virtue of an English
statute expressly authorizing it. Neither of these cases is there-
fore authority for the lien here claimed."

as to the right of an attorney, in an action for divorce and to
set aside a fraudulent conveyance, to a lien on land under the Iowa
code, § 321, see *Keehn v. Keehn*, 115 Iowa, 467.

McIntosh v. Bach, 23 Ky. L. R. 74, 62 S. W. 515; *West v. Ba-*
13 App. Div. (N. Y.) 371; *Adee v. Adee*, 55 App. Div. (N. Y.) 63;
Bourne v. Wiley, 124 Mich. 370; *Hunt v. McClanahan*, 1 Heisk.
(Tenn.) 503; *Pierce v. Lawrence*, 16 Lea (Tenn.) 572; *Stanford v.*
Drews, 12 Heisk. (Tenn.) 664; *Grant v. Lookout Mountain Co.*, 93
(Tenn.) 691; *Boring v. Jabe* (Tenn. Ch. App.) 53 S. W. 763. But not
services in a chancery suit to subject lands to sale in satisfaction
of a judgment at law. *Gribble v. Ford* (Tenn. Ch. App.) 52 S. W.
7.

Tolson, J., in *Hunt v. McClanahan*, 1 Heisk. (Tenn.) 505, says:
"land in litigation is generally as much in the custody of the
court as a pecuniary fund under control of the court, it is difficult to
perceive why an attorney is not entitled to a lien for his fees, just
much in the one case as in the other. Nor can any valid reason
be given why the lien, which is enforced every day in favor of vendors,
mechanics, carriers, landlords and others, to whom property is de-
livered for safe keeping, improvements, repairs, or other work to be
done upon or in reference to the specific article delivered, shall not
be declared in favor of attorneys, upon the property in litigation."

But it seems to be well settled that such lien does not attach to land for services rendered in defending a suit brought against his client, or in clearing a title, in relation to it,¹⁰⁷⁰ unless there is a special agreement for such lien.¹⁰⁷¹ As has been said: "Nowhere have I found this charging lien in favor of an attorney exists except in moneys in the hands of a court, which his service secured or judgments or decrees recovered by him for his client. Nowhere have I found that a claim of lien for services defensive purely has been sustained. To sustain such a claim there must be an affirmative recovery, and then the attorney is paid out of the thing recovered. It may be that such a claim of an attorney in defense of an action against an estate is very valuable in preserving assets of that estate, but there is no lien therefor. What the estate retains against its founded claims against it it already had; it simply loses them by reason of successful defense against assault; it has recovered nothing."¹⁰⁷² But it is held that he has a lien of homestead for services rendered in protecting against creditors.¹⁰⁷³

§ 734. Superiority of attorney's special lien.

(a) **In general.**—The equitable doctrine of who is prior in time, is mightier in right, *qui prior est tempore, potior est jure*, applies as well to an attorney's equitable lien on a judgment as to other equities. Hence, the attorney's special lien on a judgment will be superior to all claims against the client attaching to the judgment subsequently to the

¹⁰⁷⁰ *Hinson v. Gamble*, 65 Ala. 605; *Lee v. Winston*, 68 Ala. 324; *Hershy v. Du Val*, 47 Ark. 86; *Greer v. Ferguson*, 56 Ark. 324; Ga. § 1989; *Hodnett v. Bonner*, 107 Ga. 452; *Wood v. Hughes*, Ind. 179; *Greenhill v. Bowling's Adm'r*, 13 Ky. L. R. 495; *Thompson v. Thompson*, 23 Ky. L. R. 1535, 65 S. W. 457; *Weil v. Levi*, Ann. 135; *Lunrau v. Edwards*, 39 La. Ann. 876; *Potts v. G. Miss.* 57; *Goslin v. Campbell*, 7 Ohio Dec. 456; *Garner v. 1 Lea* (Tenn.) 29; *Fowler v. Lewis' Adm'r*, 36 W. Va. 112; *v. McCoy*, 36 W. Va. 772.

¹⁰⁷¹ *Kilbourne v. Wiley*, 124 Mich. 370.

¹⁰⁷² *Fowler v. Lewis*, 36 W. Va. 112.

¹⁰⁷³ *Strohecker v. Irvine*, 76 Ga. 639, 2 Am. St. Rep. 62; *v. Lerch*, 105 Tenn. 693.

ent of the attorney's lien,¹⁰⁷⁴ it being presumed that such subsequent attaching creditors have notice of the attorney's lien. Thus such lien of the attorney is superior to an attachment by a trustee process, subsequent in time,¹⁰⁷⁵ or to a subsequently attaching creditor,¹⁰⁷⁶ or to one who purchases property during the pendency of a suit, with notice of the attorney's lien for services upon such property,¹⁰⁷⁷ to all other subsequent liens, no matter how created.¹⁰⁷⁸ Likewise the attorney's special lien is superior to the rights of an assignee of the judgment. The assignee takes merely an equitable title subject to the lien of the attorney for services rendered in recovering the judgment,¹⁰⁷⁹ although

¹⁰⁷⁴ *Lawrence v. United States*, 71 Fed. 228; *Mahone v. Southern Tel. Co.*, 33 Fed. 702; *McCain v. Portis*, 42 Ark. 402; *Coleman v. Austin*, 99 Ga. 629; *Morrison v. Ponder*, 45 Ga. 167; *Hargett v. Cadden*, 107 Ga. 773; *Lovett v. Moore*, 98 Ga. 158; *Hawk v. Ament*, 111 Ill. App. 390; *Justice v. Justice*, 115 Ind. 201; *Myers v. McHugh*, 116 Iowa, 335; *Thayer v. Daniels*, 113 Mass. 129; *Henry v. Traynor*, 11 Minn. 234; *Palmer v. Palmer*, 24 Misc. (N. Y.) 217; *Damron v. Robertson*, 12 Lea (Tenn.) 372; *Brown v. Bigley*, 3 Tenn. Ch. 618; *Hutchinson v. Howard*, 15 Vt. 544; *Weed Sewing Mach. Co. v. Boutelle*, 56 Vt. 570, 48 Am. Rep. 821.

¹⁰⁷⁵ *Weed Sewing Mach. Co. v. Boutelle*, 56 Vt. 570, 48 Am. Rep. 821; *Hutchinson v. Howard*, 15 Vt. 544; *Parker v. Parker*, 71 Vt. 387.

¹⁰⁷⁶ *Justice v. Justice*, 115 Ind. 201; *Damron v. Robertson*, 12 Lea (Tenn.) 372.

¹⁰⁷⁷ *McCain v. Portis*, 42 Ark. 402; *Mahone v. Southern Tel. Co.*, 33 Fed. 702; *Suwannee Turpentine Co. v. Baxter*, 109 Ga. 597.

¹⁰⁷⁸ *Hutchinson v. Worthington*, 7 App. D. C. 548.

¹⁰⁷⁹ *Frink v. McComb*, 60 Fed. 486; *Central Trust Co. v. Richmond*, 101 Fed. 803; *Sexton v. Pike*, 13 Ark. 193; *Davidson v. La Plata County Com'rs*, 26 Colo. 549; *Peterson v. Struby*, 25 Ind. App. 19; *Ballinger v. Tarbell*, 16 Iowa, 491, 85 Am. Dec. 527; *Wetherby v. Weaver*, 11 Minn. 73; *Yates v. Kinney*, 33 Neb. 853; *Maloney v. Douglas County (Neb.)* 89 N. W. 248; *Gulliano v. Whitenack*, 9 Misc. (N. Y.) 100; *In re Gates*, 51 App. Div. (N. Y.) 350; *People v. New York Common Pleas*, 13 Wend. (N. Y.) 649, 28 Am. Dec. 495; *Hinman v. Rogers*, 4 Ohio Dec. 303; *Cunningham v. McGrady*, 2 Baxt. (Tenn.) 100; *Taylor v. Badoux* (Tenn. Ch. App.) 58 S. W. 919; *Fitzgerald's Ex'r v. Irby*, 99 Va. 81; *Parker v. Parker*, 71 Vt. 387. Although an attorney, in Illinois, has no special lien on a judgment, in the absence of an agreement to that effect, yet where such agreement is

the assignee takes for value and without notice.¹⁰⁸⁰ he cannot collect more than his lien as against the assignee.¹⁰⁸¹

Such lien, however, would be subject to any rights in the client's property that existed at the time the attorney's lien attaches, or to a subsequent purchaser for value without notice.¹⁰⁸²

(b) As to adverse party's right of set-off.—As to whether or not an attorney's special or charging lien on the proceeds of a judgment recovered by him is superior to the adverse party's right of set-off against such judgment, the authorities do not agree. In some cases it is held that the attorney's special lien is subject to the adverse party's right of set-off, and that he cannot claim his fees and charges on the proceeds of a judgment recovered by him, until the defendant has had allowed against such judgment any equitable demand he had against the plaintiff at the time the judgment was rendered;¹⁰⁸³ and this right of set-off

made, his lien takes precedence of the claim of a subsequent assignee without notice. *Hawk v. Ament*, 23 Ill. App. 390.

¹⁰⁸⁰ *Gulliano v. Whitenack*, 9 Misc. (N. Y.) 562; *Maloney v. Las County* (Neb.) 89 N. W. 248; *Renick v. Ludington*, 16 378; *Bent v. Lipscomb*, 45 W. Va. 183, 72 Am. St. Rep. 815; *v. Pike*, 13 Ark. 193; *Frink v. McComb*, 60 Fed. 486.

¹⁰⁸¹ *Bruce v. Anderson*, 176 Mass. 161.

¹⁰⁸² *Gregory v. Pike*, 67 Fed. 837; *Rumrill v. Huntington*, (Conn.) 163; *Gager v. Watson*, 11 Conn. 168; *Van Renswick v. 2 MacArthur* (D. C.) 172; *Lovett v. Moore*, 98 Ga. 158; *Cole Austin*, 99 Ga. 629; *Ward v. Sherbondy*, 96 Iowa, 477; *Des Gas Co. v. West*, 50 Iowa, 16; *Montgomery v. Gaar*, *Scott & Ky. L. R.* 607, 37 S. W. 580; *Adee v. Adee*, 55 App. Div. (N. Y.) 378; *Schmertz v. Hammond*, 51 W. Va. 408.

¹⁰⁸³ *United States: Winterset Nat. Bank v. Eyre*, 3 McCra 8 Fed. 733; *Fitzhugh v. McKinney*, 43 Fed. 461.

Alabama: *Jackson v. Cloppon*, 66 Ala. 29, 33; *Mosely v. N 74 Ala. 422*; *Ex parte Lehman*, 59 Ala. 631.

Connecticut: *Benjamin v. Benjamin*, 17 Conn. 110; *Gager son*, 11 Conn. 168; *Andrews v. Morse*, 12 Conn. 444, 31 Am. D.

Iowa: *Hurst v. Sheets*, 21 Iowa, 501; *Watson v. Smith*, 6 228; *Tiffany v. Stewart*, 60 Iowa, 207.

be defeated, although the client assigns the judgment to his attorney to secure his fees and charges.¹⁰⁸⁴ This rule is based upon the principle that as the attorney has a lien only on the client's interests, or on what is due to his client from the opposite party, such party must be allowed his equitable claims and rights before it is known what is due to the client.

On the other hand, there is a class of cases which holds that the attorney's lien on a judgment is superior to the adverse party's right of set-off against such judgment, and that his claim for fees and charges should be respected before a set-off is allowed.¹⁰⁸⁵

Maryland: *Marshall v. Cooper*, 43 Md. 46; *Levy v. Steinbach*, 43 Md. 212.

New York: *People v. New York Common Pleas*, 13 Wend. 649, 13 Am. Dec. 495; *Nicoll v. Nicoll*, 16 Wend. 446; *Porter v. Lane*, 8 N. Y. 277; *Dunken v. Vandenberg*, 1 Paige, 622. But see later cases post, note 1085, under the statute.

North Dakota: *Clark v. Sullivan*, 3 N. D. 280.

Texas: *Wright v. Treadwell*, 14 Tex. 255.

Vermont: *Fairbanks v. Devereaux*, 58 Vt. 359; *McDonald v. McDonald*, 57 Vt. 502.

West Virginia: *Renick v. Ludington*, 16 W. Va. 378.

Wisconsin: *Yorton v. Milwaukee, L. S. & W. R. Co.*, 62 Wis. 367; *Worth v. Tallman*, 66 Wis. 533. Compare *Stanley v. Bouck*, 107 N. Y. 225.

¹⁰⁸⁴ *Yorton v. Milwaukee, L. S. & W. R. Co.*, 62 Wis. 367; *Fitzhugh v. McKinney*, 43 Fed. 461; *Aber's Petition*, 18 Pa. Super. Ct. 110.

¹⁰⁸⁵ *Florida*: *Carter v. Davis*, 8 Fla. 183.

Illinois: *Brent v. Brent*, 24 Ill. App. 448.

Indiana: *Puett v. Beard*, 86 Ind. 172, 44 Am. Rep. 280; *Adams v. Adams*, 82 Ind. 587; *Justice v. Justice*, 115 Ind. 201.

Kansas: *Leavenson v. Lafontane*, 3 Kan. 523.

Kentucky: *Robertson v. Shutt*, 9 Bush, 659.

Maine: *Peirre v. Bent*, 69 Me. 381; *Stratton v. Hussey*, 62 Me. 460; *Hooper v. Brundage*, 22 Me. 460.

Michigan: *Kinney v. Tabor*, 62 Mich. 517.

Minnesota: *Lindholm v. Itasca Lumber Co.*, 64 Minn. 46.

Nebraska: *Finney v. Gallop (Neb.)* 89 N. W. 276. Compare *Field v. Maxwell*, 44 Neb. 900.

New Hampshire: *Shapley v. Bellows*, 4 N. H. 347; *Holt v. Quimby*, 4 N. H. 79; *Currier v. Boston & M. R. R.*, 37 N. H. 223; *Rowe v. Langley*, 49 N. H. 395.

But there seems to be no doubt but that this lien is to a right of set-off acquired after the judgment is rendered.¹⁰⁸⁶ And where there is an agreement between attorney and client, by which the latter agrees to pay over his fees and charges out of the proceeds of the judgment obtained by the attorney, it is an equitable assignment of the attorney, of such judgment to the amount of his fees. And such assignment will prevail over the defendant's right of set-off.¹⁰⁸⁷

§ 735. Notice of special lien.

It is held in some cases that an attorney's special charging lien is not complete, as between himself and the adverse party, until the attorney has notified such party or his authorized agent, of his intention to claim the judgment as to protect it against any settlement or satisfaction of judgment by such party,¹⁰⁸⁸ unless such party knows

New Jersey: Phillips v. Mackay, 54 N. J. Law, 319; Hendrickson, 39 N. J. Law, 239; Terney v. Wilson, 45 N. J. Law, 282.

New York: Delaney v. Miller, 84 Hun, 244; Bevins v. Hun, 590; Bamberger v. Ashinsky, 21 Misc. 716.

Ohio: Diehl v. Friester, 37 Ohio St. 473.

Oregon: Ladd v. Ferguson, 9 Or. 180.

Tennessee: Roberts v. Mitchell, 94 Tenn. 277.

¹⁰⁸⁶ Warfield v. Campbell, 38 Ala. 527, 82 Am. Dec. 724; v. Rice, 78 Ga. 81; Boyle v. Boyle, 106 N. Y. 654; Bradt v. Cow. (N. Y.) 416; Pierce v. Lawrence, 16 Lea (Tenn.) 577; v. Aultman, 3 S. D. 477.

¹⁰⁸⁷ Weeks v. Wayne Circuit Judges, 73 Mich. 256; Ely v. 28 N. Y. 365; Terney v. Wilson, 45 N. J. Law, 282; Williams v. Gersoll, 89 N. Y. 508; Frink v. McComb, 60 Fed. 486.

¹⁰⁸⁸ *United States:* Patrick v. Leach, 12 Fed. 661.

Colorado: Boston & C. Smelting Co. v. Pless, 9 Colo. 1; Colorado State Bank v. Davidson, 7 Colo. App. 91; Johnson v. Lan, 13 Colo. 423.

Connecticut: Andrews v. Morse, 12 Conn. 444, 31 Am.

Iowa: Casar v. Sargent, 7 Iowa, 317; Jennings v. Bacon, 403; Phillips v. Germon, 43 Iowa, 101.

Kansas: Kansas Pac. R. Co. v. Thacher, 17 Kan. 92; Leach v. Lafontane, 3 Kan. 523.

Minnesota: Dodd v. Brott, 1 Minn. 270, 66 Am. Dec. 541; v. Cargill, 86 Minn. 271.

ney's lien or has knowledge of facts sufficient to put him in inquiry.¹⁰⁸⁹ In other cases, however, it is held that the pendency of the suit is of itself sufficient notice to all parties, and it is not necessary to give actual notice thereof to the opposite party,¹⁰⁹⁰ or to a purchaser of the judgment;¹⁰⁹¹ and a defendant settling with the plaintiff without attorney's knowledge does so at his own risk.

Nebraska: *Cones v. Brooks*, 60 Neb. 698; *Cobbey v. Dorland*, 50 Neb. 373; *Elliott v. Atkins*, 26 Neb. 403.

New Hampshire: *Young v. Dearborn*, 27 N. H. 324, 328; *Grant v. Hazeltine*, 2 N. H. 541.

New Jersey: *Braden v. Ward*, 42 N. J. Law, 518; *Barnes v. Taylor*, 30 N. J. Eq. 467; *Black v. Black*, 32 N. J. Eq. 75.

New York: *Marshall v. Meech*, 51 N. Y. 140, 10 Am. Rep. 572; *Mer v. Morris*, 3 Caines, 165. But see later cases, post, note 1090. *Oregon*: *Morrell v. Miller*, 36 Or. 412; *Day v. Larsen*, 30 Or. 247.

South Dakota: *Pirie v. Harkness*, 3 S. D. 178.

Vermont: *Manning v. Leighton*, 65 Vt. 84, 95; *Hooper v. Welch*, 169, 5 Am. Rep. 267; *Hurlbert v. Brigham*, 56 Vt. 368; *Weed v. Eng Mach. Co. v. Boutelle*, 56 Vt. 570, 48 Am. Rep. 821.

West Virginia: *Renick v. Ludington*, 16 W. Va. 378.

Wisconsin: *Courtney v. McGavock*, 23 Wis. 619; *Voell v. Kelly*, 64 Wis. 504.

Alabama: *Gammon v. Chandler*, 30 Me. 152; *Hobson v. Watson*, 34 Me. 66, 6 Am. Dec. 632; *Newbert v. Cunningham*, 50 Me. 231, 79 Am. Dec. 612; *Davidson v. La Plata County Com'rs*, 26 Colo. 549; *Young v. Dearborn*, 27 N. H. 324; *Covington v. Bass*, 88 Tenn. 496.

Kentucky: *Stephens v. Farrar*, 4 Bush (Ky.) 13; *Newbert v. Cunningham*, 50 Me. 231, 79 Am. Dec. 612; *Hobson v. Watson*, 34 Me. 20, 56 Am. Dec. 632; *Hunt v. McClanahan*, 1 Heisk. (Tenn.) 503; *Vaughn v. John*, 12 Heisk. (Tenn.) 472. Under the Georgia Code, § 1989, what is necessary is the fact that the suit is pending. *Little v. Don*, 89 Ga. 411; *Coleman v. Austin*, 99 Ga. 629 (except as to bona fide purchasers); *Suwannee Turpentine Co. v. Baxter*, 109 Ga. 509. Compare *Gray v. Lawson*, 36 Ga. 629; *Green v. Southern Exp. Co.*, 39 Ga. 20. So under the New York Code Civ. Proc. § 66, notice to attorney's lien need not be given, as the record is of itself notice thereof. *Kipp v. Rapp*, 2 How. Pr. (N. S.) 169; *Albert v. Co. v. Van Orden*, 64 How. Pr. 79; *Keeler v. Keeler*, 51 Hun, 109; *Fenwick v. Mitchell*, 34 Misc. 617; *Custer v. Greenpoint Ferry Co.*, 98 N. Y. 660; *Keane v. Keane*, 86 Hun, 159; *Peri v. New York & H. R. R. Co.*, 152 N. Y. 521. Compare earlier cases, supra, note 1088.

Arkansas: *McCain v. Portis*, 42 Ark. 402.

But notice of the existence of such a lien to the assignee of such judgment or decree is not essential in order to retain the lien against such assignee.¹⁰⁹² "If it is for the security of the attorney, as against the debtor, to give notice to him of his lien, this may be done at the convenience, as the attorney must know who the debtor is; if it is apparent, in case the debt is assigned, he may know who the assignee is; if he most likely cannot, know who the assignee is. It is reasonable to require the assignee who takes the assignment subject to the same equity and in no better condition than it was in the assignor's hands, and who knows, or is presumed to know, the law as to the attorney's lien, to make the necessary inquiry before he takes the assignment of the judgment; and notice to him from the attorney, which frequently be impracticable, is not necessary."¹⁰⁹³

Any notice, where required, is sufficient that informs the other party that a lien is claimed, its nature and character, and for what and upon what it is sought to be enforced;¹⁰⁹⁴ and in some states it is required that notice must be given or filed in writing.¹⁰⁹⁵

§ 736. How this lien is enforced.

An attorney's special lien, in respect to its enforcement, is different from his general lien. Whereas the general is merely a passive right to retain property and cannot be actively enforced, on the other hand the special may take active steps to enforce his special lien against one or the other of the parties or against both.¹⁰⁹⁶ As

¹⁰⁹² *Renick v. Ludington*, 16 W. Va. 378; *Sexton v. Phillips*, 193; *Heartt v. Chipman*, 2 Aikens (Vt.) 162.

¹⁰⁹³ By *Skinner, C. J.*, in *Heartt v. Chipman*, 2 Aikens.

¹⁰⁹⁴ *Crowley v. Le Duc*, 21 Minn. 412; *Forbush v. Leonard*, 303; *Cones v. Brooks*, 60 Neb. 698.

¹⁰⁹⁵ *Patrick v. Leach*, 12 Fed. 661; *Coleman v. Austin*, 9 Day v. Bowman, 109 Ind. 383; *Alderman v. Nelson*, 111 Phillips v. Germon, 43 Iowa, 101; *Kansas Pac. R. Co. v. Leavenson*, 17 Kan. 92; *Leavenson v. Lafontane*, 3 Kan. 523; *Noftz v. Fett*, 63 Kan. 354; *Elliott v. Atkins*, 26 Neb. 403; *Clark v. Hroch*, 3 N. D. 280; *Hroch v. Aultman*, 3 S. D. 477; *Wooding v. Wash.* 207.

¹⁰⁹⁶ *In re Wilson*, 12 Fed. 235; *Adams v. Fox*, 40 Bar 442.

heretofore, an attorney who has recovered a judgment in his client's name, to the extent of fees and charges for services rendered, to be considered the equitable assignee of such judgment; and after he has fully complied with all conditions or requirements on his part, and has given notice as required, if there is no other remedy expressly provided, he may enforce his claim against such judgment in the same manner as any other assignee.¹⁰⁹⁷ But it does not constitute him an assignee of the judgment in such a way as to entitle him to go into another court to enforce the same by an action in his own name.¹⁰⁹⁸ He may, by application to the court, obtain a rule protecting or enforcing his lien, through the court's control of the judgment, or otherwise.¹⁰⁹⁹ And if it appears that fees are due an attorney for services rendered in a particular cause, he may be added as a party plaintiff in such action for the purpose of protecting and enforcing his lien.¹¹⁰⁰ So the attorney, by virtue of his lien on the judgment, may take the money in full, if he can lay hold of it, and if he applies to a court to protect his lien, the court will, upon proper application, do so by preventing money from being paid over until his lien is satisfied, and where, after notice of the lien, the judgment debtor pays the amount of the judgment to the judgment creditor, he may be required to pay it again to the attorney¹¹⁰¹ at least to the extent of the attorney's lien.

Woods v. Verry, 4 Gray (Mass.) 357; *Stratton v. Hussey*, 62 N. Y. 86; *Marshall v. Meech*, 51 N. Y. 140, 10 Am. Rep. 572; *Tarver v. Tarver*, 53 Ga. 43; *In re Lexington Ave.*, 30 App. Div. 602, 157 N. Y. 678.

Adams v. Fox, 40 Barb. (N. Y.) 442; *Smelker v. Chicago & N. W. R. Co.*, 106 Wis. 135.

Tuttle v. Claffin, 86 Fed. 964; *Walker v. Floyd*, 30 Ga. 237; *W. v. Goode*, 29 Ga. 185; *Goodrich v. McDonald*, 112 N. Y. 157; *National Exhibition Co. v. Crane*, 54 App. Div. (N. Y.) 175; *Yourlie v. Wilson*, 1 Tenn. Ch. 614; *State v. Sachs*, 3 Wash. 371; *Smelker v. Chicago & N. W. R. Co.*, 106 Wis. 135.

Reynolds v. Reynolds, 10 Neb. 574; *Oliver v. Sheeley*, 11 Neb. 17; *Patrick v. Leach*, 3 McCrary, 555, 17 Fed. 476; *Fitzgerald's v. Irby*, 99 Va. 81.

Adams v. Fox, 40 Barb. (N. Y.) 442; *Campbell v. Terney*, 7 Law J. 189. And see *Mitchell v. Piqua Club Ass'n*, 15 Misc. (N. Y.) 366; *Commercial Tel. Co. v. Smith*, 57 Hun (N. Y.) 176.

So a special lien upon funds in the hands of the party, duly perfected by proper notice before payment to the client, may be enforced by summary proceedings in the court in which the services were rendered.¹¹⁰² And if a sheriff has collected money on a judgment recovered by the attorney, the latter may proceed against him to have the amount of the lien retained out of such money.¹¹⁰³ But the court should not make an order practically enforcing the lien, without giving any notice to or hearing of the clients.¹¹⁰⁴ If the amount of the lien is not fixed, the court should merely declare the lien and leave the attorney to enforce it by proper proceedings; but where the parties have agreed upon the amount of the fee, the court should enforce it.¹¹⁰⁵ An attorney is not entitled to have a lien declared for services, where there is no fund under the control of the court upon which a lien can be fixed, and no adverse parties against whom a decree in favor could be rendered.¹¹⁰⁶

Although a judgment, upon which the attorney has a lien for his fees and costs, has been discharged by the court, the attorney may still enforce his lien upon the judgment by an action in the name of the creditor.¹¹⁰⁷ But where the title to the judgment has passed from his client to a third party, the attorney must obtain leave of court, before he can institute supplementary proceedings upon the judgment in the name of his client, especially where nothing is said in the proceedings, instituted by an affidavit, about the lien of the attorney.¹¹⁰⁸

¹¹⁰² *Weicher v. Cargill*, 86 Minn. 271; *Forbush v. Leonard*, 267; *Crowley v. Le Duc*, 21 Minn. 412.

¹¹⁰³ *Gill v. Truelsen*, 39 Minn. 373; *Harney v. Demoss*, (Miss.) 174; *Pugh v. Boyd*, 38 Miss. 326; *Gray v. Maxwell*, 108; *Haynes v. Perry*, 76 Ga. 33.

¹¹⁰⁴ *Attorney General v. North America L. Ins. Co.*, 93 N. J. 100; *Black v. Black*, 32 N. J. Eq. 74.

¹¹⁰⁵ *Perkins v. Perkins*, 9 Heisk. (Tenn.) 95.

¹¹⁰⁶ *New Memphis Gaslight Co. Cases*, 105 Tenn. 268, 80 Am. Rep. 880.

¹¹⁰⁷ *Stone v. Hyde*, 22 Me. 318; *Bickford v. Ellis*, 50 Me. 231, 79 Am. Dec. 612. But see *Butterton v. Champlin*, 12 R. I. 550, 34 Am. Rep. 722.

¹¹⁰⁸ *Moore v. Taylor*, 2 How. Pr. (N. S.; N. Y.) 343. See also *Howitt v. Merrill*, 113 N. Y. 630.

In New York it is expressly provided that "the court upon the petition of the client or attorney may determine and enforce the lien."¹¹⁰⁹ An attorney's lien under such statute, where a plea of accord and satisfaction has been interposed, cannot be enforced without an order of court to allow the prosecution of the action notwithstanding the settlement.¹¹¹⁰ In Tennessee it is held that such lien cannot be enforced by petition in a divorce suit setting up a lien on attached property, but an original bill must be filed.¹¹¹¹ After the attorney's right of action upon the contract for fees between him and the client has been barred by the statute of limitations, he cannot enforce his lien upon the judgment.¹¹¹² So, if he never acquired any lien on the judgment for his fees by a compliance with the statute, he cannot, after his claim is barred in a suit at law by the statute of limitations, prosecute a suit in equity to have a lien established upon the judgment.¹¹¹³

737. By what law governed.

The determination and enforcement of the attorney's lien shall be governed by the law of the place where the judgment was recovered and the lien attached, and not by the law of the place where it is sought to be enforced, if the latter is without the jurisdiction where the lien attached.¹¹¹⁴

738. How this lien is waived or lost.

No definite rule can be laid down as to the ways in which an attorney may waive or otherwise lose his special lien. It

¹¹⁰⁹ New York Code Civ. Proc. § 66; *Zimmer v. Metropolitan St. Co.*, 32 Misc. (N. Y.) 262; *In re Rowland*, 55 App. Div. 66, 166 N. Y. 641; *Fischer-Hansen v. Brooklyn Heights R. Co.*, 63 App. Div. (N. Y.) 356; *In re King*, 168 N. Y. 53. But an equitable action will not lie to enforce a lien under the New York statute. *Fromme Union Surety & Guaranty Co.*, 39 Misc. 105.

¹¹¹⁰ *Doyle v. New York, O. & W. R. Co.*, 66 App. Div. (N. Y.) 398.

¹¹¹¹ *Payne v. Payne*, 106 Tenn. 467.

¹¹¹² *Larned v. Dubuque*, 86 Iowa, 166. But see *Higgins v. Scott, Barn. & Adol.* 413.

¹¹¹³ *McNagney v. Frazer*, 1 Ind. App. 98.

¹¹¹⁴ *Citizens Nat. Bank v. Culver*, 54 N. H. 327, 20 Am. Rep. 134; *In re King*, 34 Misc. (N. Y.) 10.

may be stated generally, however, that such lien is waived or lost by the attorney entering into an express agreement with his client to that effect, or by his doing which shows a manifest intention on his part to waive rights under the lien.¹¹¹⁵ Thus such lien may be waived by the attorney's recovering judgment against his client for his services,¹¹¹⁶ or by his releasing property from operation of the judgment.¹¹¹⁷ or by taking an assignment to himself and claiming absolute ownership of the whole or of a part thereof;¹¹¹⁸ or by permitting the client to relate that a judgment in favor of a third person should be a lien thereon.¹¹¹⁹ So the attorney may lose his special lien by failing to proceed in a proper manner to protect and enforce it;¹¹²⁰ or by failing to proceed within a reasonable proper time.¹¹²¹ So if the attorney voluntarily withdraws from a case, or refuses to proceed without sufficient cause, he thereby loses his right to a special lien on the judgment when recovered.¹¹²²

But such lien is not lost by the fact that the judgment is allowed to become dormant, and then revived by or

¹¹¹⁵ *Speer v. Matthews*, 78 Ga. 757; *Cowen v. Boone*, 115 Ga. 350; *Barnabee v. Holmes*, 115 Iowa, 581; *Goodrich v. Mott*, 112 N. Y. 157; *West v. Bacon*, 164 N. Y. 425; *In re King*, 164 N. Y. Div. 152, modified in 168 N. Y. 53; *Renick v. Ludington*, 168 N. Y. 378.

¹¹¹⁶ *Jones v. Muskegon Circuit Judge*, 95 Mich. 289. And see *Jones v. Canaan*, 14 Vt. 485.

¹¹¹⁷ *Wishard v. Biddle*, 64 Iowa, 526.

¹¹¹⁸ *Whitehead v. Jessup*, 7 Colo. App. 460; *Bishop v. Giddens*, 100 Cal. 541; *Whitehead v. Jessup*, 7 Colo. App. 460; *Bishop v. Giddens*, 100 Cal. 541; *Cantrell v. Ford* (Tenn. Ch. App.) 46 S. W. 581.

¹¹¹⁹ *McClare v. Lockard*, 121 N. Y. 308.

¹¹²⁰ *Kreuzen v. Forty-Second St., M. & St. N. Ave. R. Co.*, 100 Cal. 588; *Guild v. Borner*, 7 Baxt. (Tenn.) 266.

¹¹²¹ *McNagney v. Frazer*, 1 Ind. App. 98; *Reavey v. C. & N. Y. R. Co.*, 100 Cal. 541; *McNagney v. Frazer*, 1 Ind. App. 98; *Reavey v. C. & N. Y. R. Co.*, 100 Cal. 541; *McNagney v. Frazer*, 1 Ind. App. 98; *Reavey v. C. & N. Y. R. Co.*, 100 Cal. 541.

¹¹²² *Morgan v. Roberts*, 38 Ill. 65; *Tuck v. Manning*, 53 N. Y. 455, 17 Civ. Proc. R. 175; *Halbert v. Gibbs*, 16 App. Div. 126; *Hektograph Co. v. Foul*, 11 Fed. 844; *Fargo v. Paul*, 11 Fed. 844 (N. Y.) 568.

attorneys;¹¹²³ nor by a delay of several years to collect the demand, if the attorney has been guilty of no negligence and the debtor has notice of the claim;¹¹²⁴ nor by the attorney's paying over money to his client without deducting his fees;¹¹²⁵ nor by taking the note of his client for his fee, unless it clearly appears that the note was intended in discharge of the obligation.¹¹²⁶ Nor does the fact that the attorney has rendered his client for professional services affect his right to enforce his special lien, where the claims giving rise to the lien are not included in the action.¹¹²⁷ And the fact that the attorney has knowledge of an assignment by his client of a claim which he is prosecuting to judgment will not estop the attorney from claiming a lien upon the judgment recovered, when there has been no express waiver of the right of lien.¹¹²⁸ Where an attorney sent in a bill for services to a trustee, with a letter stating that he did not wish to impress a lien on the fund, but desired a check for the amount of his services, it is not a waiver of his lien on securities in the trustee's hands.¹¹²⁹

IX. TERMINATION OF THE RELATION.

739. In general.

The termination of the relation of attorney and client is governed by the same rules as the termination of other agencies.¹¹³⁰ It may be terminated by special agreement between the attorney and client, by the acts or conduct of one of the parties, or by operation of law. If it is expressly stipulated that the relation shall continue for a certain length of time

¹¹²³ *Jenkins v. Stephens*, 60 Ga. 216.

¹¹²⁴ *Stone v. Hyde*, 22 Me. 318. And see *Fitzgerald's Ex'r v. Boyd* (Va.) 37 S. E. 777.

¹¹²⁵ *Hooper v. Brundage*, 22 Me. 460.

¹¹²⁶ *Davis v. Jackson*, 86 Ga. 138; *Johnson v. Johnson R. Signal*, 57 N. J. Eq. 79; *Pope v. Armstrong*, 3 Smedes & M. (Miss.) 4; *Renick v. Ludington*, 16 W. Va. 378.

¹¹²⁷ *Commercial Telegram Co. v. Smith*, 57 Hun (N. Y.) 176.

¹¹²⁸ *Niagara F. Ins. Co. v. Hart*, 13 Wash. 651. And see *Hutchinson v. Worthington*, 7 App. D. C. 548.

¹¹²⁹ *In re King*, 168 N. Y. 53.

¹¹³⁰ See ante, chapter 7.

only, or until the accomplishment of a certain purpose, will terminate upon the expiration of such time or the accomplishment of such purpose, unless previously terminated. As has been seen in a previous section, when an attorney is employed to conduct litigation or other legal business, his authority in general continues until the final termination of such litigation or business.¹¹³¹ In such cases the attorney's authority will, in general, be terminated upon the termination of such business or suit.¹¹³² Thus, it was at common law that final judgment in a cause terminated the attorney's authority therein;¹¹³³ but according to later cases his authority is not thereby terminated but continues for certain purposes after the judgment has been rendered.¹¹³⁴ In the jurisdictions where it is held that an attorney's authority ceases upon judgment being entered, rendition and entry of judgment against his client terminate the relation.¹¹³⁵ But this rule seems to apply only to the defendant's attorney and not the plaintiff's.

So the relation would, at least, be suspended by war.

§ 740. By act of parties.

The same rules apply to the termination of attorney and client by acts of parties, as to the termination of prior

¹¹³¹ Ante, § 650; *Manning v. Hayden*, 5 Sawy. 360, Fed. C. 9,043; *Nichols v. Dennis*, R. M. Charl. (Ga.) 188; *Smith v. Birmingham*, 59 Kan. 552; *Gray v. Wass*, 1 Me. 257; *Bathgate v. ...*, 59 N. Y. 533; *Love v. Hall*, 3 Yerg. (Tenn.) 408; *Langdon v. ...*, 30 Vt. 285; *Sturgiss v. Dart*, 23 Wash. 244; *Flanders v. ...*, 18 Wis. 575.

¹¹³² *Grames v. Hawley*, 50 Fed. 319; *Pemberton v. Lock*, How. (U. S.) 257; *Hay v. Cole*, 11 B. Mon. (Ky.) 70; *De ...*, Jones, 31 Miss. 606; *Tenney v. Berger*, 48 N. Y. Super. Ct. 11; *v. Solomon*, 25 Misc. (N. Y.) 695; *Magnolia Metal Co. v. S*, worth R. Supply Co., 26 Misc. (N. Y.) 63; *Dooley v. Dooley* (Tenn.) 306; *Hoffman v. Cage*, 31 Tex. 595.

¹¹³³ See ante, § 650.

¹¹³⁴ See ante, § 650.

¹¹³⁵ See ante, § 650.

¹¹³⁶ *Blackwell v. Willard*, 65 N. C. 555, 6 Am. Rep. 749. *Rice v. O'Keefe*, 6 Helsk. (Tenn.) 638, where it was held that late civil war did not necessarily dissolve or suspend the relation of attorney and client existing prior to it.

and agent under the same circumstances.¹¹³⁷ As to an attorney's abandonment of the relation, and as to his discharge by the client, we have treated heretofore in this chapter, to which reference is here made.¹¹³⁸ So where the interest of the client in, and his power over, the subject-matter to which the employment of the attorney relates are extinguished, the relation is thereby terminated.¹¹³⁹ Thus, the relation of attorney and client in respect to services in procuring and defending certain patents is dissolved when with the knowledge of the attorneys, who prepared the papers for the purpose, the client transferred all his right and interest in the patents to a corporation, for the benefit of which all the subsequent services of the attorneys in respect to the patents were rendered.¹¹⁴⁰

741. Right of attorney to withdraw.

An attorney retained to conduct litigation for his client has a right, for sufficient cause and upon due and proper notice, to withdraw from the case at any time.¹¹⁴¹ But though the attorney has the right to do so, yet as he is the attorney of record, and remains so until he is withdrawn from such record, it is necessary that he make application to the court in which the case is being prosecuted, that he be withdrawn as the attorney of the client.¹¹⁴²

742. Right of client to change attorneys.

So, as a general rule, the client has the right to change

¹¹³⁷ See ante, chapter 7.

¹¹³⁸ See ante, §§ 710, 711.

¹¹³⁹ *Foster v. Bookwalter*, 152 N. Y. 166; *Robinson v. Brennan*, 90 N. Y. 208.

¹¹⁴⁰ *Foster v. Bookwalter*, 152 N. Y. 166.

¹¹⁴¹ *Silver Peak Gold Min. Co. v. Harris*, 116 Fed. 439; *Morgan Roberts*, 38 Ill. 65; *Cullison v. Lindsay*, 108 Iowa, 124; *Tenney Berger*, 93 N. Y. 524; *Thomas v. Morrison* (Tex. Civ. App.) 46 W. 46. And see ante, § 711.

¹¹⁴² *United States v. Curry*, 6 How. (U. S.) 106; unless the adverse party consents, *Chicago Public Stock Exch. v. McClaghry*, 90 Ill. App. 358; *Hickox v. Fels*, 86 Ill. App. 216; *Symmes v. Major*, 10 Ind. 443; *Henck v. Todhunter*, 7 Har. & J. (Md.) 275, 16 Am. Dec. 300; *Roush v. Fort*, 3 Mont. 175; *Branch v. Walker*, 92 N. Y. 87.

his attorney at any time and for any cause he may proper. If he pays to the attorney a just compensation for services rendered up to the time of the change, he cannot give to the court or to the attorney any reason for desiring to change. In the conduct of his cause the client has an inherent right to employ whom he pleases; and for any reason he desires to substitute another attorney for the one already engaged, and he makes the attorney go by paying him all he has earned, no one has a right to prevent him from so doing,¹¹⁴³ unless the attorney has a claim coupled with an interest, and in the absence of fraud. Where a mother engages an attorney to prosecute her claim for damages for injuries to her infant son, thereafter, the action by the son, for whom the mother has been appointed guardian ad litem, for such injuries, she is entitled to have another attorney substituted.¹¹⁴⁵

But in England,¹¹⁴⁶ and in some of the cases in this country,¹¹⁴⁷ the rule is that the client cannot change his attorney.

¹¹⁴³ *In re Paschal*, 10 Wall. (U. S.) 483; *Dodge v. Schuchman*, 101 Fed. 517, 12 Fed. 515; *Ronald v. Mutual R. F. Life Assn.*, 101 Fed. 228; *Jones v. United States*, 15 Ct. Cl. 204; *In re Herman*, 101 Fed. 517, receiver of an insolvent bank may dismiss an attorney employed by him; *Lee v. San Joaquin County Super. Ct.*, 101 Cal. 354; *Woodbury v. Nevada Southern R. Co.*, 121 Cal. 165; *Fry v. Hendy*, 99 Cal. 172; *Cohen v. Smith*, 33 Ill. App. 344; *Lynch*, 99 Ill. App. 454; *Wells v. Hatch*, 43 N. H. 246; *Gullick*, 17 N. J. Law, 435; *Ogden v. Devlin*, 45 N. Y. Super. Ct. Trust v. Repoor, 15 How. Pr. (N. Y.) 570; *Creighton v. In*, 20 Barb. (N. Y.) 541; *In re Prospect Ave.*, 85 Hun (N. Y.) 268; *O'Sullivan v. Metropolitan St. R. Co.*, 39 Misc. (N. Y.) 268; *ton v. Sneed*, 18 Tex. 135. Where the cause of action is for negligence and damages, the court, in discontinuing a similar action begun for the client by the original attorneys, may secure them any recovery he may ultimately obtain in the new action.

Ivan v. Metropolitan St. R. Co., 39 Misc. (N. Y.) 268.

¹¹⁴⁴ *Gulf, C. & S. F. R. Co. v. Miller*, 21 Tex. Civ. App. 609.

¹¹⁴⁵ *Bryant v. Brooklyn Heights R. Co.*, 64 App. Div. (N. Y.) 268.

¹¹⁴⁶ *Anon.*, 7 Mod. 50, though he be ever so great a cheat; 12 Mod. 440; *Perry v. Fisher*, 6 East, 549; *Macpherson v. P.*, 1 Doug. 217; *Powel v. Little*, 1 W. Bl. 8; *May v. Pike*, 4 W. 197; *Twort v. Dayrell*, 13 Ves. 195; *Ginders v. Moore*, 1 & C. 654.

¹¹⁴⁷ *In re Paschal*, 10 Wall. (U. S.) 483; *In re Herman*,

without an order from the court. Ordinarily such order will not be granted, if the attorney is not in fault, until the client has paid or otherwise satisfied the attorney's claim for fees and charges;¹¹⁴⁸ and if the attorney is employed under a contract for a contingent fee, he cannot complain of an order substituting the names of other attorneys on the record as counsel, as this cannot prejudice his rights growing out of the contract and the breach thereof.¹¹⁴⁹ But if the attorney is guilty of negligence or misconduct, or refuses to go on with the cause, the court may make an order, substituting another in his place, although his fees have not been paid or secured.¹¹⁵⁰ And an attorney cannot refuse to go on with the cause merely because his client fails to supply him with

517; *Jones v. United States*, 15 Ct. Cl. 204; *Gage v. Atwater*, 136 Cal. 170; *Lee v. San Joaquin County Super. Ct.*, 112 Cal. 354; and it is only necessary for the client to prefer a request for such change to justify the court in making an order therefor, *Woodbury v. Nevada Southern R. Co.*, 121 Cal. 165; *Cohen v. Smith*, 33 Ill. App. 344; *Chicago Public Stock Exch. v. McLaughry*, 50 Ill. App. 358; *Landyskowski v. Lark*, 108 Mich. 500; *Mumford v. Murray*, Hopk. Ch. (N. Y.) 369; *Stevenson v. Stevenson*, 3 Edw. Ch. (N. Y.) 340; *Wolf v. Trochelman*, 5 Rob. (N. Y.) 611; *Parker v. Williamsburgh*, 13 How. Pr. (N. Y.) 250; *Hoffman v. Van Nostrand*, 14 Abb. Pr. (N. Y.) 336; *Walton v. Sugg*, 61 N. C. (Phil.) 98, 93 Am. Dec. 580.

¹¹⁴⁸ *Witt v. Ames*, 11 Wkly. Rep. 751; *Langley v. Stapleton*, *Barnes' Notes Cas.* 40; *In re Herman*, 50 Fed. 517; *Wilkinson v. Tilden*, 21 Blatchf. 192, 14 Fed. 778; *Curtis v. Richards*, 4 Idaho, 434; *Laird v. Laird* (N. J. Eq.) 3 Atl. 339; *Hoffman v. Van Nostrand*, 14 Abb. Pr. (N. Y.) 336; *Gardner v. Tyler*, 5 Abb. Pr. (N. S.; N. Y.) 33; *Ulster County Sup'rs v. Brodhead*, 44 How. Pr. (N. Y.) 411; *In re Mitchell*, 57 App. Div. (N. Y.) 22; *Barkley v. New York Cent. & H. R. R. Co.*, 35 App. Div. (N. Y.) 167, 42 App. Div. 597; *Yuengling v. Betz*, 58 App. Div. (N. Y.) 8; *In re Public Works Dept.*, 58 App. Div. (N. Y.) 459; *Sandberg v. Victor Gold & Silver Min. Co.*, 18 Utah, 66; *Payette v. Willis*, 23 Wash. 299; *Schultheis v. Nash*, 27 Wash. 250.

¹¹⁴⁹ *Root v. McIlvaine*, 22 Ky. L. R. 7, 56 S. W. 498.

¹¹⁵⁰ *In re Faithfull*, L. R. 6 Eq. 325; *Robins v. Goldingham*, L. R. 13 Eq. 440; *Colegrave v. Manley*, Turn. & R. 400, 1 Law J. Ch. (O. S.) 39; *Sloo v. Law*, 4 Blatchf. 270, Fed. Cas. No. 12,958; *Walsh v. Shumway*, 65 Ill. 471; *In re H——*, 93 N. Y. 381; *In re Prospect Ave.*, 85 Hun (N. Y.) 257.

money, without incurring the risk of having another attorney substituted in his stead.¹¹⁵¹ After judgment, however, the client may ordinarily employ another attorney without any formal substitution,¹¹⁵² as the attorney's general authority ceases upon the entry of judgment.

— **Notice of change.** Where such change of attorney is made, notice thereof should be given to the attorney of the adverse party, for as the old attorney appears on the record the adverse party would be justified in still dealing with him until he received notice of the change,¹¹⁵³ unless such notice has been waived.¹¹⁵⁴ And mandamus will not lie to compel a judgment order such substitution where it does not appear that notice has been given.¹¹⁵⁵ If a client, after discharging his attorney, permits him to remain such on record, he is bound against parties ignorant, without fault on their part, of his discharge, by any act that, by virtue of his retainer, he is authorized to do.¹¹⁵⁶

¹¹⁵¹ *In re H*——, 93 N. Y. 381; *In re Faithfull*, L. R. 6 Eq. 440; *Robins v. Goldingham*, L. R. 13 Eq. 440; *Halbert v. Gibbs*, 10 Div. (N. Y.) 126.

¹¹⁵² *Hussey v. Welby*, Sayer, 218; *Tipping v. Johnson*, 2 Minn. P. 357; *Knox v. Randall*, 24 Minn. 479; *State v. Gullick*, 17 N. J. 435; *Thorp v. Fowler*, 5 Cow. (N. Y.) 446; *Egan v. Rooney*, 38 Pr. (N. Y.) 121; *Ward v. Sands*, 10 Abb. N. C. (N. Y.) 60; *Magnolia Metal Co. v. Sterlingworth R. Supply Co.*, 37 App. Div. (N. Y.) 366.

¹¹⁵³ *Chicago Public Stock Exch. v. McClaughry*, 50 Ill. App. 173; *Cronkhite v. Evans-Snyder-Buel Co.*, 6 Kan. App. 173; *Combs v. Stockbridge*, 38 Mich. 342; *McFarland v. Butler*, 11 Minn. 72; *Ken v. McBroom*, 38 Mo. 342; *Hoplin v. Winnemucca First Bank*, 25 Nev. 84; *Belliveau v. Amoskeag Mfg. Co.*, 68 N. H. 225; 73 Am. St. Rep. 577; *Parker v. Williamsburgh*, 13 How. Pr. (N. Y.) 250; *Krekeler v. Thaule*, 49 How. Pr. (N. Y.) 138; *Magnolia Metal Co. v. Sterlingworth R. Supply Co.*, 37 App. Div. (N. Y.) 366; *Belle City Mfg. Co. v. Kemp*, 27 Wash. 111; *Schultheis v. Waterhouse*, 27 Wash. 250; *Waterhouse v. Freeman*, 13 Wis. 339; *Boyd v. Freeman*, 5 Wis. 240.

¹¹⁵⁴ *Livermore v. Webb*, 56 Cal. 489; *Withers v. Little*, 5 Cal. 370.

¹¹⁵⁵ *Rundberg v. Belcher*, 118 Cal. 589.

¹¹⁵⁶ *Belliveau v. Amoskeag Mfg. Co.*, 68 N. H. 225, 73 Am. St. Rep. 577.

743. Termination by operation of law.

(a) **By death or disability of client.**—So the relation of attorney and client, unless coupled with an interest, would be terminated by operation of law upon the death of the client, and the attorney could not proceed in the same cause without new authority from the executor or administrator.¹¹⁵⁷ And where a partnership is the client, as its dissolution is in effect at death, it would have the same effect as the death of an individual client.¹¹⁵⁸ So would the relation be terminated by the insanity of the client,¹¹⁵⁹ or by his bankruptcy.¹¹⁶⁰ But although the attorney's general authority ceases upon the death of his client, there are some things that he may do thereafter. Thus, it is held that an attorney may move to dismiss an appeal after his client's death,¹¹⁶¹ or file exceptions.¹¹⁶² So it is held that the client's death does not revoke the attorney's authority to proceed, under a contract by which the attorney undertakes to prosecute to final adjudication a claim for an exclusive contingent compensa-

¹¹⁵⁷ *Farrand v. Land & R. Imp. Co.*, 86 Fed. 393; *Eagleton Mfg. Co. v. West, Bradley & Cary Mfg. Co.*, 2 Fed. 774; *Butler v. Goreley*, 16 U. S. 303; *Cook v. Parham*, 63 Ala. 456; *Moyle v. Landers*, 78 Cal. 99, 12 Am. St. Rep. 22; *Judson v. Love*, 35 Cal. 463; *Pedlar v. Houd*, 116 Cal. 461; *Risley v. Fellows*, 10 Ill. 531; *Turnan v. Lemke*, 84 Ill. 286; *Lochenmeyer v. Fogarty*, 112 Ill. 572; *Harness State*, 57 Ind. 1; *Clegg v. Baumberger*, 110 Ind. 536; *Clark's Ex'rs v. Parrish's Ex'rs*, 1 Bibb (Ky.) 547; *Campbell v. Kincaid*, 3 T. B. Mon. (Ky.) 242; *Graham v. Hendricks*, 24 La. Ann. 477; *Bourmon v. Boudousquie*, 3 La. (O. S.) 526; *Giles v. Eaton*, 54 Me. 6; *Gleason v. Dodd*, 4 Metc. (Mass.) 333; *Prior v. Kiso*, 96 Mo. 3; *Avery v. Jacob*, 59 N. Y. Super. Ct. 585; *Adams v. Nellis*, 59 N. Y. Pr. (N. Y.) 385; *Lapaugh v. Wilson*, 43 Hun (N. Y.) 619; *Van Campen v. Bruns*, 54 App. Div. (N. Y.) 86; *Villhauer v. Toledo*, 10 Ohio Dec. 8; *Cisna v. Besch*, 15 Ohio, 300, 45 Am. Dec. 576; *Gray v. Cooper*, 23 Tex. Civ. App. 3; *Wilson v. Smith*, 22 Grat. (Va.) 3.

¹¹⁵⁸ *Lochrane v. Stewart*, 8 Ky. L. R. 688, 2 S. W. 903; or a corporation, *Salton v. New Beeston Cycle Co.*, 69 Law J. Ch. 20, 81 Law T. (N. S.) 437.

¹¹⁵⁹ See ante, chapter 7.

¹¹⁶⁰ See ante, chapter 7.

¹¹⁶¹ *Whartenby v. Reay*, 92 Cal. 74.

¹¹⁶² *Kelley v. Riley*, 106 Mass. 339, 8 Am. Rep. 336.

tion.¹¹⁶³ And again it is held that suits brought by heirs before the death of the client may be prosecuted by the same attorneys after his death.¹¹⁶⁴

(b) **By death or disability of attorney.**—The relation between attorney and client would likewise be terminated upon the death of the attorney.¹¹⁶⁵ But if a law firm had been retained and one of them dies, it seems that the relation is thereby ipso facto terminated, but the client may nevertheless consider the employment as terminated on the ground that the contract was for the personal services of all the members of the firm, and if he does not so elect, the surviving partners are bound to proceed in the client's business. And the mere fact of the dissolution of a law firm does not necessarily dissolve the agency, and the client may sue them both for the performance of a duty confided to them.

So there are certain disabilities that would have the effect of terminating the relation, as where the attorney is barred,¹¹⁶⁶ or where he is appointed to a judicial or other position incompatible with his duties to his client.

¹¹⁶³ Price v. Haeberle, 25 Mo. App. 201.

¹¹⁶⁴ Liles' Succession, 24 La. Ann. 490.

¹¹⁶⁵ Hildreth v. Harvey, 3 Johns. Cas. (N. Y.) 300; Hildreth v. Weaver, 15 Hun (N. Y.) 375.

¹¹⁶⁶ Little v. Caldwell, 101 Cal. 553, 40 Am. St. Rep. 89; v. McCampbell, 75 Tex. 644. But see McGill's Creditors v. McGill, 2 Adm'r, 2 Metc. (Ky.) 258.

¹¹⁶⁷ Downs v. Allen, 22 Fed. 805; McCoon v. Galbraith, 293.

¹¹⁶⁸ Moyers v. Graham, 15 Lea (Tenn.) 57.

¹¹⁶⁹ Justice v. Lairy, 19 Ind. App. 272, 65 Am. St. Rep. 408; v. Hollins, 14 Md. 158; Farmers' Bank v. Mackall, 3 Gill (M.

CHAPTER XX.

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I. IN GENERAL.

744. Definition and nature.

A broker is one whose business it is to bargain for, or to bring others together to bargain in matters of trade, commerce, and navigation, and for so doing receives a commission, commonly called "brokerage."¹ It is considered a requi-

Pott v. Turner, 6 Bing. 702; *Janssen v. Green*, 4 Burrow, 2103; *Proper v. California*, 155 U. S. 657; *Stratford v. Montgomery*, 110 U. S. 619; *Saladin v. Mitchell*, 45 Ill. 79; *Todd v. Bourke*, 27 La. 385; *Third Nat. Bank v. Snyder*, 10 Mo. App. 215; *Morris v. Eddy*, 20 N. J. Eq. 236; *Shepherd v. Hedden*, 29 N. J. Law, 340; *Giggins v. Moore*, 34 N. Y. 417; *Keys v. Johnson*, 68 Pa. 42; *Com. v. Yerkes*, 119 Pa. 272; *Middleton v. Thompson*, 163 Pa. 112; *Parker v. Walker*, 86 Tenn. 566; *State v. Duncan*, 16 Lea (Tenn.) 75. A person who, for a commission, negotiates purchases and sales of stocks, bonds, or securities on behalf of clients, either in his own name, or in the principal's name, and receives the same, and delivers possession and executes transfers thereof, is a broker within an ordinance imposing a license tax on such. *Banta v. Chicago*, 172 Ill. 204; *Maun v. Chicago*, 110 Ill. 186. A person who buys claims for himself is not a broker. *Gast v. Buckley*, 23 Ky. L. R. 992, 64 S. W. 632. A broker has also been defined as "one whose business it is to negotiate purchases or sales of stocks, exchange, bullion, coined money, bank-notes, promissory notes, or other securities, for himself or for others. Ordinarily, the term 'broker' is applied to one acting for others; but the part of the definition which speaks of purchases and sales for himself is equally as important as that which speaks of purchases and sales for others." *Warren v. Shook*, 10 U. S. 710; *United States v. Cutting*, 3 Wall. (U. S.) 441. A

site of this definition that the broker receive his commission, where he receives any at all, by way of a commission on the transaction. Thus, an agent to sell goods on commission is a mere broker,² but an agent who receives a fee and not a fee or commission is not a broker.³ But the broker usually receives a commission for the services he performs in the transaction, and it is part of his duty to do so, yet it is not essential that he should receive a commission in every particular case, for if he so desires to perform his services gratuitously. And as brokers of a class, usually receive such commissions, it is considered that the receipt of commissions is one of the essential characteristics of the class. But the fact that some particular broker in some particular case, performs his services gratuitously does not alter the definition of brokers as a class. It is also necessary that he should negotiate such transactions as a business. An occasional sale of real property does not make the one negotiating such sale a broker, within the meaning of a statute in regard to such.⁴ And as seen hereafter, statutes requiring brokers to take out a license and pay a tax do not ordinarily apply to persons who negotiate only one or an occasional sale.⁵

Strictly speaking, a broker, as such, is merely a "man" or "negotiator," always acting in the name of his principal, and never in his own name.⁶ Formerly, a broker was one who negotiated contracts between merchants only.

A broker has again been defined as an agent whose ordinary course of business is to negotiate and make contracts for the sale or purchase of goods and other property, of which he is not in possession or control. *Bowstead, Agency*, p. 4; *1 Corrie*, 2 Barn. & Ald. 137; *Stevens v. Biller*, 53 Law J. 50 Law T. (N. S.) 36.

² *Dunn v. Wright*, 51 Barb. (N. Y.) 244.

³ *Portland v. O'Neill*, 1 Or. 218.

⁴ *Yedinskey v. Strouse*, 6 Pa. Super. Ct. 587, 42 Wkly. N. 12.

⁵ *Post*, § 780.

⁶ *Henderson v. State*, 50 Ind. 234; *Fowler v. Hollins*, L. R. 616; *Saladin v. Mitchell*, 45 Ill. 79; *Graham v. Duckwall*, (Ky.) 12; *Com. v. Yerkes*, 119 Pa. 272; *Keys v. Johnson*, 42; *Tauro v. Cassin*, 1 Nott & McC. (S. C.) 173.

ference to goods or money;⁷ and even now, while applying, in its widest sense, to brokers who negotiate other transactions, the term is more particularly applied to persons whose business it is to negotiate and effect contracts of sales between merchants.⁸ But such a definition is too limited to cover the various classes of transactions, conducted and negotiated by brokers at the present time. The term now extends to all uses of brokers,—to those who buy, sell, or exchange real estate for others, or to those who carry on negotiations between merchants in the interest of trade, commerce, and navigation.⁹

—**License.** In some jurisdictions there are express statutory provisions or ordinances prescribing that the broker's right to do business shall depend upon his procuring a license to that effect.¹⁰ One who negotiates sales of goods for a commission without having possession of the goods is a "commercial broker," within the sense of an ordinance requiring such person to take out a license.¹¹ And one who sells merchandise by sample on commission, having an office where the samples are on exhibition, is a local commercial broker, notwithstanding the fact that he is the sole local representative of his principals.¹² But a corporation transacting for itself business which its charter authorizes it to do does not thereby become a broker, and its officers, by transacting such business, do not become liable to the penalty prescribed for

Milford v. Hughes, 16 Mees. & W. 174. See *Banta v. Chicago*, 111 Ill. 204, 213.

Hamberger v. Marcus, 157 Pa. 133, 37 Am. St. Rep. 719, 721.

McGavock v. Woodlief, 20 How. (U. S.) 221; *Little Rock v. Bar-*
ber, 33 Ark. 436; *Doonan v. Ives*, 73 Ga. 295; *Banta v. Chicago*, 172
 Ill. 204, 213; *Pierce v. Thomas*, 4 E. D. Smith (N. Y.) 354; *Doty*
Hillier, 43 Barb. (N. Y.) 529; *Glenworth v. Luther*, 21 Barb. (N.
 Y.) 145; *Johnson v. Hulings*, 103 Pa. 498, 49 Am. Rep. 131.

Banta v. Chicago, 172 Ill. 204; *Com. v. Roswell*, 173 Mass. 119;
Win v. Hurley, 10 Pa. Super. Ct. 104; *St. Louis v. McCann*, 157
 Mo. 301; *Stockard v. Morgan*, 105 Tenn. 412. A person who buys
 goods for himself is not a broker within the meaning of such a
 statute. *Gast v. Buckley*, 23 Ky. L. R. 992, 64 S. W. 632.

Harby v. Hot Springs (Ark.) 11 S. W. 694.

Stratford v. Montgomery, 110 Ala. 619.

carrying on a brokerage business without having taken license therefor.¹³

§ 745. Distinction between broker and factor—Auctioneer.

A broker differs materially from a factor. He has not possession of the goods in respect to which he mediates;¹⁴ and he has no authority to sell in his own name but only in that of his principal;¹⁵ while a factor, as we shall see, not only may have possession of the goods which he sells, but he also has a special property therein, and he sells them in his own name.¹⁶

A broker differs from an auctioneer, also, in that he sells at private and not public sale; and that he must sell in the name of his principal; and that he has no special property in the goods which are the subject of his agency.

§ 746. Broker may also act as factor.

The character of broker is also sometimes combined with that of factor. In such cases one must carefully distinguish between his acts in the one character and those in the other, as the same rules do not always apply to each. There is nothing in our law which prevents a broker from becoming also a factor in the same transaction, if he chooses to undertake the double character. This double character may be created either implicitly by accepting a local custom, or expressly, by specifically investing the agent with such powers. If a principal invests the agent with the office of a factor, and indicia of title, he necessarily authorizes the broker, so far as concerns innocent third parties,

¹³ *Henderson v. State*, 50 Ind. 234.

¹⁴ *Baring v. Corrie*, 2 Barn. & Ald. 137; *Pott v. Turner*, 702; *Braun v. Chicago*, 110 Ill. 186; *Dunn v. Wright*, 51 N. Y. 244; *Price v. Wisconsin M. & F. Ins. Co.*, 43 Wis. 276.

¹⁵ *Henderson v. State*, 50 Ind. 234; *Hass v. Ruston*, 14 N. Y. 8, 56 Am. St. Rep. 288; *Dunn v. Wright*, 51 Barb. (N. Y.) 2; *v. Wisconsin M. & F. Ins. Co.*, 43 Wis. 276.

¹⁶ *Slack v. Tucker*, 23 Wall. (U. S.) 321, 330; *Perkins v. Alabama*, 50 Ala. 154; *Marfield v. Douglass*, 1 Sandf. (N. Y.) 360; *Brooks*, 26 Wend. (N. Y.) 367; *Price v. Wisconsin M. & F. Ins. Co.*, 43 Wis. 276.

es, to charge the property the same as could a factor.¹⁷ Thus, it is not usually the duty of a broker, in the absence of express words to that effect, to see to the delivery of the goods on the payment of the price. But in order to make the principal chargeable beyond the limit which a broker's ordinary functions prescribe, there must be a clear case of enlargement of the broker's powers by him.¹⁸

747. Kinds of brokers.

There are many different kinds or classes of brokers, which derive their names from the articles in which they deal, or the nature of the business in respect to which they negotiate. Thus, there is the bill and note broker; the exchange broker; the merchandise broker; the ship broker; the real estate broker; the pawnbroker; the insurance broker; the custom house broker; the stock broker; and others. These different classes or kinds of brokers will be more fully treated in subsequent sections of this chapter.¹⁹

748. Agent of whom.

Primarily, a broker is the agent of the person who first employs him;²⁰ and, as a general rule, he cannot act as the agent of both parties throughout the same transaction, without the knowledge and consent of both.²¹ But to a certain extent, and for certain purposes, by the understanding and usage of business, and the nature of his employment, a broker is authorized to act for both parties. But what he does in that relation he does not in the interest of either party, but as an indifferent person. Every one who employs him is presumed to know and consent that to that extent, and for such purposes, he may so act.²² Thus, as soon as he negotiates

¹⁷ *Whitehead v. Tuckett*, 15 East, 400; *Rutenberg v. Main*, 47 Cal. 3; *Hass v. Ruston*, 14 Ind. App. 8, 56 Am. St. Rep. 288; *McNeill Tenth Nat. Bank*, 46 N. Y. 325; *Andrews v. Kneeland*, 6 Cow. (N. Y.) 354.

¹⁸ *Rutenberg v. Main*, 47 Cal. 213.

¹⁹ *Post*, §§ 795-803.

²⁰ *Woods v. Rocchi*, 32 La. Ann. 210; *Galgate Ship Co. v. Starr*, Fed. 902.

²¹ *Post*, § 765.

²² *Walker v. Osgood*, 98 Mass. 348, 93 Am. Dec. 169.

with another, as vendee, he becomes also the agent of the latter, for the purpose of receiving and transmitting communications. So, also, he is the agent of both parties, for the purpose of making the memorandum required by the law to prevent frauds.²³ And as shall be seen in subsequent sections, where he acts merely as a middleman between the parties, exercising no discretion or judgment in the negotiation, he may act for both parties.²⁴

II. THE RELATION.

§ 749. Formation.

As in all other classes of agents, a broker has authority to act for his principal only by virtue of an appointment, express or implied, by the latter. Unless required by statute, no particular form is necessary for such appointment. It may, as a general rule, be either in writing or by words; or if his acts were previously unauthorized they may be accepted and ratified by the principal. All that is necessary in ordinary cases is to show that the broker has acted with the consent of the principal, whether that be given by a written instrument, by words, or by implication from the conduct of the parties.²⁵

Thus a real estate broker will be regarded as

²³ *Rucker v. Cammeyer*, 1 Esp. 105; *Galgate Ship Co. v. S. S. Co.*, 100 Fed. 902; *Saladin v. Mitchell*, 45 Ill. 79; *Woods v. Rocchi*, 100 Ann. 210; *Hinckley v. Arey*, 27 Me. 362; *Colvin v. Williams*, 100 & J. (Md.) 38, 5 Am. Dec. 417; *Coddington v. Goddard*, 100 (Mass.) 436; *Schlesinger v. Texas & St. L. R. Co.*, 87 Mo. 100; *Merritt v. Clason*, 12 Johns. (N. Y.) 102, 7 Am. Dec. 286; *v. Schmidt*, 57 Wis. 172, 46 Am. Rep. 35.

²⁴ Post, §§ 765, 781.

²⁵ *Thompson v. Gardiner*, 1 C. P. Div. 777; *Land Mortgage Agency Co. v. Preston*, 119 Ala. 290; *Fischer v. Bell*, 91 Ind. 100; *Metcalf v. Kent*, 104 Iowa, 487; *Arnold v. Teel*, 182 Mass. 1; *v. Irvine*, 6 Minn. 496, 80 Am. Dec. 461; *Pierce v. Thomas*, 100 Smith (N. Y.) 354; *Fiero v. Fiero*, 52 Barb. (N. Y.) 288; *Speed v. Robinson*, 1 Hilt. (N. Y.) 423; *McCormack v. Mc*, 36 Misc. (N. Y.) 775. A letter to a broker by his principal stating that he had paid a specified price for certain property and that he would not sell it for less than a certain other sum is an authority to the broker to sell to a buyer. *Campbell v. Galloway*, 148 Ind. 440.

been employed by the owner of land to procure a sale thereof, where such broker notifies the owner that he can find a purchaser at a specified price for which the owner had previously been willing to sell, and the latter, knowing the occupation of the former, replies that his price is still the same;²⁶ though the mere fact that the broker asks and obtains from such owner the price at which he is willing to sell does not of itself establish the relation of principal and broker.²⁷ In some jurisdictions, it is provided by statute that the broker's authority to buy, sell, or exchange real estate must be in writing subscribed by the principal, or he can recover no commissions for services so rendered;²⁸ and where the abbreviations used in a broker's authorization to sell land were such that parties familiar with land descriptions could understand them easily, their use did not render the authorization void for uncertainty.²⁹

But it is necessary in all cases that he should be authorized in some manner. If the broker renders his services as a mere volunteer, without any authority, express or implied, the principal would not be bound to pay him for the same.³⁰ Thus a real estate broker, who took an option to purchase certain real estate at a stated price, is not the agent of the owner or negotiating its sale.³¹ But even in such cases, although the broker had no express or implied authority, yet if the principal accepts and appropriates the labors performed by the broker, and thus ratifies and confirms his acts, he will be liable to the broker for the value of such services.³²

²⁶ *Morson v. Burnside*, 31 Ont. 438.

²⁷ *Castner v. Richardson*, 18 Colo. 496.

²⁸ Cal. Civ. Code, § 1624; *McCarthy v. Loupe*, 62 Cal. 299; *Myres v. Surryhne*, 67 Cal. 657; *McGeary v. Satchwell*, 129 Cal. 389; *Polan v. O'Toole*, 129 Cal. 488 (though the broker was not regularly engaged in the real estate business); *Longstreth v. Korb*, 64 N. J. Law, 112; *Ballou v. Bergvendsen*, 9 N. D. 285.

²⁹ *Melone v. Ruffino*, 129 Cal. 514.

³⁰ *Hinds v. Henry*, 36 N. J. Law, 328; *Twelfth St. Market Co. v. Jackson*, 102 Pa. 269; *Holley v. Townsend*, 16 How. Pr. (N. Y.) 125; *Keys v. Johnson*, 68 Pa. 42; *Pierce v. Thomas*, 4 E. D. Smith (N. Y.) 355. Post, § 769.

³¹ *Southack v. Lane*, 23 Misc. (N. Y.) 515.

³² *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378, 38 Am. Rep. 441, 12. See post, § 769.

§ 750. Termination.

(a) **In general.**—Likewise, the broker's authority is terminated as in other agencies, either by operation of law or by act of parties.³³ If the relation had been established for a particular purpose, as soon as that purpose has been accomplished, whether by the broker, by the principal, or by a third party, the relation will cease. Thus, the agency of a real estate broker is said to cease upon the delivery of the title and payment for the property.³⁴ So where several brokers are employed independently about the same transaction, the accomplishment of the object of the employment by one of them operates as a revocation of the authority of the others, and third persons subsequently dealing with them do so at the risk of such revocation; and no action for damages will lie in such case, although no notice of the sale has been given, unless the nature of the broker's contract requires such notice.³⁵ As has been seen in other cases, the principal is bound in the absence of an agreement to the contrary, to give notice to the authority of one or all of such brokers, but not to all of them. If the brokers were connected in the transaction, notice of revocation must be given to each one; and notice to one of them is not notice to the others unless they were connected with the transaction.

(b) **By acts of parties.**—Where no time for the completion of the contract is fixed by its terms, either party is at liberty to terminate it at will, by giving notice. The subject only to the requirement that it be done in good faith. Usually the broker is entitled to a fair and reasonable opportunity to perform his part of the contract, and it is of course to the right of the seller to sell indepen-

³³ See ante, chapter 7.

³⁴ Walker v. Derby, 5 Biss. 134, Fed. Cas. No. 17,068; Brennan, 55 N. J. Eq. 423; Oberlin College Trustees v. Oberlin, 10 W. Va. 812.

³⁵ Ahern v. Baker, 34 Minn. 98.

³⁶ Lloyd v. Matthews, 51 N. Y. 124.

³⁷ Rees v. Pellow, 97 Fed. 167; Cook v. Forst, 116 A. 13; Doonan v. Ives, 73 Ga. 295; Taylor v. Martin, 109 La. 13; Man v. Ellis, 64 Neb. 623; Sibbald v. Bethlehem Iron Co., 378, 38 Am. Rep. 446; Satterthwaite v. Vreeland, 3 Hun 152; Simpson v. Carson, 11 Or. 361; Knox v. Parker, 2 Was.

y.³⁸ But authority having been granted him, the right of the principal to terminate his authority, unless coupled with an interest, is absolute and unrestricted, except only that he may not do so in bad faith, and as a mere device to escape the payment of the broker's commissions.³⁹ Thus, if in the midst of negotiations instituted by the broker which were plainly and evidently approaching success, the seller should revoke the authority of the broker, with the view of completing the negotiations without his aid, and thus avoiding the payment of commissions about to be earned, it might well be said that the due performance of his obligation by the broker was purposely prevented by the principal.⁴⁰ If, however, the principal acts in good faith, not seeking to escape the payment of commissions, but moved fairly by a view of his own interest, he has the absolute right before a bargain is made while the negotiations remain unsuccessful, before commissions are earned, to revoke the broker's authority, and the latter cannot thereafter claim compensation for a sale made by the principal,⁴¹ even though it be to a customer with whom the broker unsuccessfully negotiated,⁴² and even though, to some extent, the seller might justly be said to have availed himself of the fruits of the broker's labor.⁴³ Thus an agency created for

³⁸ *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378, 38 Am. Rep. 446; *Rand v. Cronkrite*, 64 Ill. App. 208.

³⁹ *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378, 38 Am. Rep. 446; *Bird v. Phillips*, 115 Iowa, 703 (cannot be revoked where coupled with an interest); *Abbott v. Hunt*, 129 N. C. 403; *Simpson v. Carson*, 11 Or. 361; *Kelly v. Marshall*, 172 Pa. 396; *Stamets v. Deniston*, 93 Pa. 548; *Neal v. Lehman*, 11 Tex. Civ. App. 461; *Knox v. Parker*, 2 Wash. St. 34.

⁴⁰ *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378, 38 Am. Rep. 446.

⁴¹ *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378, 38 Am. Rep. 446; *Abbott v. Hunt*, 129 N. C. 403; *Cadigan v. Crabtree*, 179 Mass. 474, 18 Am. St. Rep. 397. And where the contract provides that the relation is to continue only so long as mutually satisfactory to both parties, the broker cannot claim damages for its arbitrary termination by the principal. *Dulaney v. Page Belting Co.* (Tenn. Ch. App.) 9 S. W. 1082.

⁴² *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378, 38 Am. Rep. 446; *Knox v. Parker*, 2 Wash. St. 34.

⁴³ *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378, 38 Am. Rep. 446.

the sale of lands is terminated by the withdrawal of the principal of all the unsold land from the market.⁴⁴ A broker's authority to buy shares may be revoked at any time before he has acted upon it, and money put up to enable him to pay for the shares may be demanded back;⁴⁵ but it may not be revoked if the broker has entered into a contract for purchase and become personally responsible for its performance.⁴⁶ A stockbroker's authority to sell exists until it is terminated, expressly or by implication; but this is largely governed by usage or course of dealing between the parties.

But, where a broker is expressly authorized to perform certain duties within a certain time, the principal cannot revoke his authority, and escape liability to the broker, if he accomplishes the purpose for which he was employed, as the result of efforts commenced before such revocation.⁴⁸ Where the principal revokes a broker's authority, the same rule applies as in other agencies,—that notice of such revocation must be given to the broker in order to be binding on him.

III. AUTHORITY OF BROKER.

§ 751. In general.

The scope of a broker's duties is, as we shall see, very narrow; his duty usually being merely to act as a mediator or middleman to bring together the minds of the parties to contract, he himself taking no part in advising or negotiating, ranging the terms of the contract between the parties, and explaining the meaning of words used by them. No

⁴⁴ *Yingling v. West End Imp. Co.*, 5 Pa. Dist. R. 607; *Kavay v. Ballard*, 21 Ky. L. R. 1683, 56 S. W. 159. See *Bickford v. ...*, 9 App. Div. (N. Y.) 158; *Lipscomb v. Cole*, 81 Mo. App. 53 (where such an agency is terminated by an option to buy subsequently given to the agent depends upon the conduct of the parties).

⁴⁵ *Fletcher v. Marshall*, 15 Mees. & W. 761.

⁴⁶ *McEwen v. Woods*, 11 Q. B. 13; *Sutton v. Tatham*, 10 E. 27.

⁴⁷ *Davis v. Gwynne*, 4 Daly, 218, 57 N. Y. 676.

⁴⁸ *Blumenthal v. Goodall*, 89 Cal. 251; *McLane v. Maurer*, Civ. App. 75.

⁴⁹ *Sayre v. Wilson*, 86 Ala. 151; *Jones v. Berry*, 37 Mo. App. See ante, § 173.

ven necessary that he be present when the contract is consummated. His duties being thus limited, his authority or powers will likewise be somewhat narrow. As brokers are of different kinds and transact different sorts of business, the general authority of a broker of any particular class will be determined by the nature of the business he has to perform, and by the instructions he may receive from his principal. He must in all cases act within these limits to his power. A real estate broker's authority to sell is limited to the precise terms given him by his principal, and he cannot bind his principal by a departure therefrom.⁵⁰ Thus, the employment of a real estate broker with reference to a particular sale to be made to a person named does not authorize the broker afterwards to sell to another person.⁵¹ And a letter requesting a real estate broker to find a purchaser for a lot does not authorize him to bind the owner by signing a contract of sale in his name.⁵²

752. Effect of usage.

There are, in respect to the different classes of brokers, certain commercial customs or usages that to a very large extent, if not altogether, determine the powers and duties of brokers in each particular class.⁵³ In some classes these usages are more important and have a greater bearing on the broker's authority than in others. Especially is this so with brokers dealing on the stock-exchange. These usages in some instances have become so well recognized that they are included in the law concerning those classes. Where one employs a broker in a place and business in which there is such a usage, it is his duty, if he wishes to provide against it, to make inquiry concerning it and to make his provision against it when he employs the broker. If he does not do so, he will be presumed to have contracted with reference to

⁵⁰ *Balkema v. Searle*, 116 Iowa, 374.

⁵¹ *Breen v. Rives*, 16 App. Div. (N. Y.) 632.

⁵² *McCullough v. Hitchcock*, 71 Conn. 401; *Brandrup v. Britten*, 1 N. D. 376.

⁵³ *Cropper v. Cook*, L. R. 3 C. P. 194; *Young v. Cole*, 3 Bing. N. 724; *Taliaferro v. First Nat. Bank*, 71 Md. 200; *Sumner v. Stewart*, 69 Pa. 321; *Merwin v. Hamilton*, 6 Duer (N. Y.) 244.

it and he cannot complain thereafter.⁵⁴ And if there be a general and reasonable one it will usually make inference that the principal did not know of it.⁵⁵

But a usage or custom cannot be introduced to show a fact contrary to express instructions or agreement,⁵⁶ although it may be shown for the purpose of interpreting the meaning already given;⁵⁷ nor may it be introduced to give plain unambiguous words or phrases a meaning different from their natural import.⁵⁸ So evidence of usage cannot be introduced to show authority of a broker where such usage is unavailable,⁵⁹ or contrary to the law applicable to the case,⁶⁰ against public policy,⁶¹ or where the effect of such evidence would be to change the nature of the contract between the parties.⁶² Nor can the principal be bound by a usage

⁵⁴ *Mollett v. Robinson*, L. R. 5 C. P. 646; *Pollock v. Stables*, 12 Q. B. 765; *Sutton v. Tatham*, 10 Adol. & E. 27; *Graves v. Hurl*, & N. 210; *Robinson v. Mollett*, 44 Law J. C. P. 362; *Culbertson*, 83 Ill. 33, 25 Am. Rep. 349, 351; *Van Dusen-Harrington Co. v. Jungeblut*, 75 Minn. 298, 74 Am. St. Rep. 463; *Camden & McNair & H. Real-Estate Co.*, 76 Mo. App. 366; *Whitehouse v. McGregor*, 13 Abb. Pr. (N. Y.) 142.

⁵⁵ *Pollock v. Stables*, 12 Q. B. 765; *Sutton v. Tatham*, 10 Adol. & E. 27; *Mollett v. Robinson*, L. R. 5 C. P. 646; *Whitehouse v. McGregor*, 13 Abb. Pr. (N. Y.) 142; *Robinson v. Mollett*, 44 Law J. C. P. 362; *Van Dusen-Harrington Co. v. Jungeblut*, 75 Minn. 298, 74 Am. St. Rep. 463. But see *Gallup v. Lederer*, 1 Hun (N. Y.) 283.

⁵⁶ *Wanless v. McCandless*, 38 Iowa, 20; *Rich v. Boyce*, 314; *Spear v. Hart*, 3 Rob. (N. Y.) 420; *Dykers v. Allen*, 7 Hill (N. Y.) 497, 42 Am. Dec. 87.

⁵⁷ *Reese v. Medlock*, 27 Tex. 120, 84 Am. Dec. 611.

⁵⁸ *Barlow v. Lambert*, 28 Ala. 704, 65 Am. Dec. 378; *Thompson v. Wilson*, 7 Yerg. (Tenn.) 340, 27 Am. Dec. 515; *Ivey v. Phillips*, 1 Ala. 824; *The Reeside*, 2 Sumn. 567, Fed. Cas. No. 11,657.

⁵⁹ *Hamilton v. Young*, L. R. 7 Ir. 289; *Neillson v. James*, 10 Div. 546; *De Cordova v. Barnum*, 130 N. Y. 615, 27 Am. Dec. 538; *Evans v. Wain*, 71 Pa. 69; *Marye v. Strouse*, 5 Fed. 4; *lup v. Lederer*, 1 Hun (N. Y.) 283.

⁶⁰ *Markham v. Jaudon*, 41 N. Y. 235; *Higgins v. Moore*, 341; *Dykers v. Allen*, 7 Hill (N. Y.) 497, 42 Am. Dec. 87.

⁶¹ *Day v. Holmes*, 103 Mass. 306; *Robinson v. Mollett*, 44 Law J. C. P. 362.

⁶² *Lombardo v. Case*, 30 How. Pr. (N. Y.) 117; *Baker v. Brown*, 66 N. Y. 518, 23 Am. Rep. 80; *Spear v. Hart*, 3 Rob. (N. Y.) 420.

changes the character of the broker or the nature of the dealing, unless it be plainly shown that he had such knowledge of the usage that he must be presumed to have contracted with reference to it.⁶³

753. Implied powers—In general.

A broker who is employed to negotiate a transaction, like other agents, has, as incidental to his general power, all reasonable implied powers that may be necessary for him to accomplish the object of his employment, and which are usually used by men in his profession in like cases, unless there is something in the nature of his employment that indicates a contrary intent.⁶⁴ Or the broker's authority may be implied from a course of dealing between him and his principal,⁶⁵ or from the principal's acts in holding him out, or permitting him to act, as though he had certain powers.

754. Power to fix price and terms.

Where a broker is employed to buy or sell property, and nothing is said as to the terms or price, as incidental to his general authority, he would have the implied authority to arrange the terms of purchase or sale, including the time, place, and mode of delivery, and to fix the price, being controlled, in such, by the custom, if any, of the trade or business at that time and place.⁶⁶ If there is a usual price in similar transactions, he should fix such price; otherwise he may fix what is a fair and reasonable price, and if there is nothing to show a contrary intent he should be governed by the market or trade value. But where a broker undertakes for an agreed

Dodd v. Farlow, 11 Allen (Mass.) 426, 87 Am. Dec. 726; *Mollett v. Robinson*, L. R. 5 C. P. 646; *Robinson v. Mollett*, 44 Law J. C. P. 362.

⁶³ *Irwin v. Williar*, 110 U. S. 513; *Perry v. Barnett*, 15 Q. B. Div. 88; *Robinson v. Mollett*, 44 Law J. C. P. 362.

⁶⁴ *Bayliffe v. Butterworth*, 1 Exch. 425.

⁶⁵ *Van Dusen-Harrington Co. v. Jungeblut*, 75 Minn. 298, 74 Am. St. Rep. 463.

⁶⁶ *Daylight Burner Co. v. Odlin*, 51 N. H. 56, 12 Am. Rep. 45; *Putnam v. French*, 53 Vt. 402, 38 Am. Rep. 682; *East India Co. v. Hensley*, 1 Esp. 111.

compensation to find a purchaser satisfactory to the principal, the latter alone has the right to determine the consideration for which he will sell and the details governing the sale therefor to him;⁶⁷ nor does such employment give a broker implied power to enter into an executory agreement to sell.⁶⁸

§ 755. Power to sell on credit.

So if the broker employed to sell goods has been given no express instructions or there is no usage to the contrary, he may sell upon a reasonable credit,⁶⁹ if such is the usual manner of selling in that particular business.⁷⁰ But it is the usual mode of business to sell for cash only, and a broker cannot sell on credit unless he has special authority. Therefore, so, although he acts bona fide and with a view to the benefit of his principal.⁷¹

§ 756. Power to warrant.

As a general rule, a broker has no implied authority to warrant the quality of property which he is employed to sell; but if, at the time and place of such sale, there is a custom or usage for brokers to give a warranty of title, in similar cases, and there are no restrictions upon the broker contrary to such custom, a broker employed to sell may give such warranty as is usual in such cases.⁷² Thus, where it is customary to give a warranty in a sale by a broker, a broker employed to make such a sale may bind his principal by such warranty.

⁶⁷ Kilham v. Wilson, 112 Fed. 565.

⁶⁸ Dickinson v. Updike (N. J. Err. & App.) 49 Atl. 712.

⁶⁹ Daylight Burner Co. v. Odlin, 51 N. H. 56, 12 Am. 1; Wiltshire v. Sims, 1 Camp. 258; Delafield v. State, 26 Wend. 192; Riley v. Wheeler, 44 Vt. 189; Boorman v. Brown, 3 Q. B. 11; Clark & F. 1.

⁷⁰ Delafield v. State, 26 Wend. (N. Y.) 192.

⁷¹ Wiltshire v. Sims, 1 Camp. 258.

⁷² Dingle v. Hare, 7 C. B. (N. S.) 145; Herring v. Skaggs, 180, 34 Am. Rep. 4; Upton v. Suffolk County Mills, 11 Cush. 586, 59 Am. Dec. 163; Cooley v. Perrine, 41 N. J. Law, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

the usual warranty given therein.⁷³ So where a broker has been intrusted with the disposition of a security, he may bind his principal by an express guaranty that the security shall be paid by the maker.⁷⁴ But it has been held that a broker has no implied authority, from usage or trade, to warrant goods sold by him to be of a merchantable quality.⁷⁵

757. Power to contract in his own name.

As has been seen, strictly speaking, a broker is a mere negotiator or middleman, to bring together the minds of other parties to contract. He should always act in behalf of the party who employs him, and as he usually does not have the indicia of title, nor possession of the subject-matter of his agency, as a general rule he cannot contract in his own name, without the knowledge or consent of his principal, so as to bind both the principal and the other con-

⁷³ *Hitchcock v. Griffin*, 99 Mich. 447, 41 Am. St. Rep. 624; *The Monte Allegre*, 9 Wheat. (U. S.) 644; *Forchelmer & Co. v. Stewart*, Iowa, 600; *Andrews v. Kneeland*, 6 Cow. (N. Y.) 354; *Boorman v. Jenkins*, 12 Wend. (N. Y.) 566, 27 Am. Dec. 158; *Waring v. Mason*, 18 Wend. (N. Y.) 425. But see *Dickinson v. Gay*, 7 Allen (Mass.) 29, 83 Am. Dec. 656.

⁷⁴ *Frevall v. Fitch*, 5 Whart. (Pa.) 325, 34 Am. Dec. 558.

⁷⁵ *Dodd v. Farlow*, 11 Allen (Mass.) 426, 87 Am. Dec. 726; *Boardman v. Spooner*, 13 Allen (Mass.) 353, 90 Am. Dec. 196; *Dickinson v. Gay*, 7 Allen (Mass.) 34, 83 Am. Dec. 656. In *Dodd v. Farlow* (supra), Bigelow, C. J., says: "It was contended on the part of the plaintiffs that an authority to make such warranty is derived from the usage of trade; and evidence was offered from which, under instructions from the court, the jury have found that an authority was implied in case of a sale by a broker of the kind of merchandise described in the memorandum to insert a warranty of their quality which would be binding on the vendor. But notwithstanding this finding, we are clearly of opinion that the plaintiffs are not entitled to recover, because the alleged usage on which the jury have based their verdict is unauthorized by law, and cannot be regarded as valid. It contravenes the principle which has been sanctioned and adopted by this court upon full and deliberate consideration, that no usage will be held legal or binding on parties which not only relates to and regulates a particular course or mode of dealing, but which also ingrafts on a contract of sale a stipulation or obligation which is different from or inconsistent with the rule of the common law on the subject."

tracting party, or render the principal liable for commissions, or damages for the nonperformance of the contract, though he receives a benefit from it.⁷⁶ As has been said, "A broker occupies a peculiar relation to the contracting parties; he frequently represents both, and is often employed to a commission for buying and a commission for selling in the same transaction. He has no possession that can lead one of the contracting parties. If he were permitted to make contracts in his own name for his principal without the principal's knowledge, he would be in a position to take advantage of a rise or fall in prices. The contract being in his own name, he might claim the profits, and in the event of loss, cast it upon his principal. His position might be much abused and the interests of the principal sacrificed. It is for these reasons that the policy of the law forbids a broker from contracting in his own name without the knowledge or consent of the principal."⁷⁷ He can of course be empowered to act in his own name, either expressly or impliedly, and an authority to so act may be implied from a previous course of dealing between the parties.⁷⁸ So if the principal approves such contracts, he is liable to the broker for his commissions thereon.⁷⁹

But as to members of the stock-exchange, a different doctrine usually prevails. As shall be seen hereafter, a broker usually has or acquires possession of the stock and securities in respect to which he is employed. Also there are certain customs or usages which regulate the dealings by them; and, in the absence of express instructions to the contrary, the principal cannot complain that the broker has sold the shares in his own name and mingled them with

⁷⁶ *Hass v. Ruston*, 14 Ind. App. 8, 56 Am. St. Rep. 288; *Barnes v. Corrie*, 2 Barn. & Ald. 143; *Saladin v. Mitchell*, 45 Ill. 79; *Wright v. Duckwall*, 8 Bush (Ky.) 12; *Dunn v. Wright*, 51 Barb. 244; *Delafield v. Smith*, 101 Wis. 664, 70 Am. St. Rep. 938.

⁷⁷ *Hass v. Ruston*, 14 Ind. App. 8, 56 Am. St. Rep. 294.

⁷⁸ *Kemble v. Atkins*, Holt N. P. 434.

⁷⁹ *Delafield v. Smith*, 101 Wis. 664, 70 Am. St. Rep. 938; *Wright v. William H. Crawford Co.*, 93 Md. 390 (and he cannot sue for nonperformance of such a contract after ratifying it).

res of the same kind, if such was the custom of brokers at that time and place.⁸⁰

58. Power to receive payment.

As a broker does not have possession of the property which is employed to sell and has no authority to deliver them, ordinarily has no implied authority to receive payment for property sold by him, and if the purchaser makes payment to him, he does so at his own risk, unless from other circumstances an authority to receive it can be inferred.⁸¹ He can be authorized to do so by a local custom or usage.⁸² But a broker may be authorized to receive payment, either in express terms, or by necessary implication from the circumstances; as, if he be empowered to sell as principal; or if he has been in the habit of receiving payment for the principal in previous dealings; and in such case a payment to him will discharge the purchaser from all liability.⁸³

Insurance brokers are considered to have acquired by usage an authority to adjust losses, and to receive payment for them; but, unless authorized by some known usage or regular course of business, they can only receive payment for money.⁸⁴ So in the case of a stockbroker, as he has pos-

Horton v. Morgan, 19 N. Y. 170, 75 Am. Dec. 311; *Markham v. Audon*, 41 N. Y. 239; *Clark v. Meigs*, 13 Abb. Pr. (N. Y.) 468, 10 How. Pr. 341; *Rogers v. Gould*, 6 Hun (N. Y.) 229; *Marston v. Gould*, 69 N. Y. 226. Post, §§ 808, 809.

Campbell v. Hassel, 1 Starkie, 233; *Mynn v. Jolliffe*, 1 Moody 326; *Baring v. Corrie*, 2 Barn. & Ald. 137; *Adams v. Fraser*, 1 Fed. 211 (nor to extend the time of payment); *Englert v. White*, 1 Iowa, 97; *Graham v. Duckwall*, 8 Bush (Ky.) 12; *Higgins v. Brear*, 34 N. Y. 417, *Huffcut*, Cas. 215; *Bassett v. Lederer*, 1 Hun (N. Y.) 274; *Gallup v. Lederer*, 1 Hun (N. Y.) 282; *Dunn v. Wright*, 1 Barb. (N. Y.) 244; *John Hurd Co. v. Consolidated Steel & Wire Co.*, 47 App. Div. (N. Y.) 467; *Crosby v. Hill*, 39 Ohio St. 100. See, also, *Saladin v. Mitchell*, 45 Ill. 79; *Marx v. Otto*, 117 Mich. 510. *Higgins v. Moore*, 34 N. Y. 417, *Huffcut*, Cas. 215.

Coates v. Lewes, 1 Camp. 444; *Pickering v. Busk*, 15 East, 38; *Went v. Bennett*, 11 East, 36.

Todd v. Reid, 4 Barn. & Ald. 210; *Scott v. Irving*, 1 Barn. & Ald. 605; *Bousfield v. Creswell*, 2 Camp. 545.

session of the stocks, and is clothed with apparent authority, upon which purchasers rely, and who may not know the principal, it is his duty, according to usage, to receive payment for stock sold.⁸⁵

§ 759. Power to delegate his authority.

The relation between broker and principal is one of personal trust and confidence, and ordinarily the broker cannot delegate the power conferred upon him to another unless he is authorized, expressly or impliedly, so to do.⁸⁶ Where there is a special custom or usage which permits the broker to employ a substitute, and the broker has not been forbidden to contract according to such usage, he may do so. There are many usages of this sort especially applicable to stock brokers. Thus it seems to be the usage in Wall Street for a broker to employ one or more subordinates to transact business for their clients. This is done to fill the orders of their clients either with dispatch or secrecy.⁸⁷ The broker is also subject to the exceptions which apply to the delegation of authority by other agents,⁸⁸ as that he may perform ministerial or mechanical acts by a subagent.⁸⁹ There is an implied understanding in all cases where a broker is employed to make a purchase and sale that the purchase is to be made by the broker, the broker to his correspondent and the sale to the party who sells to him.⁹⁰

⁸⁵ *Dos P. Stock-Brokers, etc.*, 168; *Clarke v. Meigs*, 10 B. Monr. (N. Y.) 337.

⁸⁶ *Henderson v. Barnewall*, 1 Younge & J. 387; *Cockran v. Maule & S.* 301; *Jones v. Brand*, 106 Ky. 410; *Williams v. Barton*, 16 Md. 220; *Barton v. New England Mortg. Sec. Co.* (Mass.) 362; *Elwell v. Chamberlain*, 2 Bosw. (N. Y.) 230; *Bocock v. Ohio St.* 270.

⁸⁷ *Rosenstock v. Tormey*, 32 Md. 169, 3 Am. Rep. 125; *v. Wendell*, 40 Mich. 432; *Gheen v. Johnson*, 90 Pa. 38; *Allen v. Conihe*, 124 N. Y. 342.

⁸⁸ See ante, chapter 12.

⁸⁹ *Williams v. Woods*, 16 Md. 220; *Elwell v. Chamberlain*, 2 Bosw. (N. Y.) 230.

⁹⁰ *Gregory v. Wendell*, 40 Mich. 432.

10. Power to rescind or submit to arbitration.

broker who has been employed to make contracts for principal has no authority, without his principal's consent, to rescind contracts so made by him;⁹¹ unless authorized by usage⁹² or the necessity of the case,⁹³ nor can he agree to submit to arbitration any disputes that may arise out of contracts.⁹⁴

IV. DUTIES AND LIABILITIES OF BROKER TO PRINCIPAL.

1. To obey instructions.

As a general rule it is a broker's duty to obey the instructions of his principal in all matters connected with his employment. If he does not do so, he will, under ordinary circumstances, be liable to his principal for any injury that results by reason of his departure therefrom without reasonable cause.⁹⁵ Thus if a broker, contrary to instructions, fails to purchase property when it reaches a certain price or at a certain time, he will be liable for any profits if the property increases in value within a reasonable time;⁹⁶ or if he is instructed to sell when the property reaches a certain price or at a certain time, and fails to do so, he will be liable for any loss occasioned by a depreciation in value within a reasonable time thereafter.⁹⁷ So if he buys

Saladin v. Mitchell, 45 Ill. 79; *Xenos v. Wickham*, 36 Law J. 313, 16 Law T. (N. S.) 800; *Kelly v. Kauffman Mill. Co.*, 92 N. Y. 305; *Stilwell v. Mutual L. Ins. Co.*, 72 N. Y. 385.

Young v. Cole, 3 Bing. N. C. 724.

Macaulay v. Palmer, 125 N. Y. 742.

Ingraham v. Whitmore, 75 Ill. 24; *Huber v. Zimmerman*, 21 Ill. 488, 56 Am. Dec. 255; *Scarborough v. Reynolds*, 12 Ala. 252; *Dugan Cent. R. Co. v. Gougar*, 55 Ill. 503.

Gallagher v. Jones, 129 U. S. 193; *Jones v. Marks*, 40 Ill. 313; *Tran v. Ellis*, 107 Ill. 413; *Pickering v. Demeritt*, 100 Mass.

Day v. Holmes, 103 Mass. 308; *Parsons v. Martin*, 11 Gray 111; *White v. Smith*, 54 N. Y. 522; *Baker v. Drake*, 53 N. Y. 1, 13 Am. Rep. 507; *Baker v. Drake*, 66 N. Y. 518, 23 Am. Rep. 80; *Zimmermann v. Hell*, 86 Hun, 114, 156 N. Y. 703; *Schmertz v. ...*, 53 Pa. 335.

Baker v. Drake, 53 N. Y. 211, 13 Am. Rep. 507.

Baker v. Drake, 53 N. Y. 211, 13 Am. Rep. 507; *Id.*, 66 N. Y. 518, 23 Am. Rep. 80; *Jones v. Marks*, 40 Ill. 313.

at a greater price than he was instructed to buy at, to sell at a certain price and he sells at a less price, he be liable for the loss sustained.⁹⁸ If he disposes of property for a purpose or in a way not authorized, he would be liable for a conversion to his principal;⁹⁹ and if he chases without authority, the principal may repudiate the contract, and bring suit for the recovery of the money advanced to make the purchase.¹⁰⁰ So if the broker does not act strictly within the authority given to him by his principal, he will not be entitled to any commissions for his services,¹⁰¹ unless his departure from the instructions is assented to or ratified by the principal.¹⁰² But if the principal has, expressly or impliedly, ratified the broker's unauthorized acts, he cannot, in the absence of fraud on the part of such broker, recover damages for such acts.¹⁰³

If, however, extraordinary circumstances arise, by neglect of the broker, and it becomes necessary for him to act in order to save his principal's interest from imminent loss or injury, he may act contrary to express instructions. If he does so in good faith and for the apparent and real benefit of his principal's interest, and acts so done will be binding on the principal.¹⁰⁴ So if the principal's instructions are ambiguous or uncertain and may be construed

⁹⁸ *Sarjeant v. Blunt*, 16 Johns. (N. Y.) 74; *Laverty v. Smith*, 68 N. Y. 522, 23 Am. Rep. 184; *Dufresne v. Hutchinson*, 3 N. Y. 117.

⁹⁹ *Baker v. Drake*, 66 N. Y. 518, 23 Am. Rep. 80; *Mark Jaudon*, 41 N. Y. 235; *Laverty v. Snethen*, 68 N. Y. 522, 23 Am. Rep. 184; *Chew v. Louchheim*, 80 Fed. 500.

¹⁰⁰ *Voris v. McCredy*, 16 How. Pr. (N. Y.) 87.

¹⁰¹ *Hoyt v. Shipherd*, 70 Ill. 309; *Ward v. Lawrence*, 79 Ill. 486. See post, § 770 et seq.

¹⁰² *Jones v. Adler*, 34 Md. 440; *Nesbitt v. Helsær*, 49 Mo. 555; *Ward v. Lawrence*, 79 Ill. 486. See post, § 773.

¹⁰³ *Lunn v. Guthrie*, 115 Iowa, 501.

¹⁰⁴ *Foster v. Smith*, 2 Cold. (Tenn.) 474, 88 Am. Dec. 60; *Restler v. Boardman*, 1 Story, 43, Fed. Cas. No. 4,945; *Johnson v. Sturges*, 5 Day (Conn.) 556; *Drummond v. Wood*, 2 Caines 310; *Liotard v. Graves*, 3 Caines (N. Y.) 226.

two different ways, and the broker in good faith and with reasonable prudence accepts one of these constructions and acts accordingly, he will not be liable to the principal because he did not act in the way intended by the latter.¹⁰⁵

§ 762. To use reasonable diligence and skill.

Where a person holds himself out for employment, as a broker, he impliedly represents that he is qualified to act in that capacity and that he possesses the knowledge and skill usually possessed by others of the same profession. Hence, it becomes his duty, when so employed, to use a reasonable degree of skill and diligence in the conduct of his principal's business. Or in other words it is his duty to use that degree of diligence and skill which others of the same calling and in the same locality are accustomed to use under similar circumstances,¹⁰⁶ or that which a prudent man would use in the conduct of his own affairs.¹⁰⁷ And it has been said that, "unless the principal contracts for less, the agent (or broker) is bound to serve him with all his skill, judgment, and discretion."¹⁰⁸ If the broker does not use such diligence and skill he will be liable to his principal for any loss resulting from his failure to do so;¹⁰⁹ and any loss the principal may have thus sustained on account of the broker's negligence may be set off against a claim by the broker

¹⁰⁵ Ante, § 761.

¹⁰⁶ *Guesnard v. Louisville & N. R. Co.*, 76 Ala. 453; *Perin v. Parker*, 126 Ill. 201, 9 Am. St. Rep. 571; *Stewart v. Muse*, 62 Ind. 85; *Bronnenburg v. Rinker*, 2 Ind. App. 391; *Kempker v. Roblyer*, 9 Iowa, 274; *Myles' Ex'rs v. Myles*, 6 Bush (Ky.) 237; *Barnard v. Coffin*, 138 Mass. 37; *Harlow v. Bartlett*, 170 Mass. 584; *Price v. Keyes*, 62 N. Y. 378; *Nicolai v. Lyon*, 8 Or. 56; *Wilkinson v. McCullough*, 196 Pa. 205, 79 Am. St. Rep. 702; *Caruthers v. Ross* (Tex. Civ. App.) 63 S. W. 911. And see *Hopkins v. Clark*, 158 N. Y. 299.

¹⁰⁷ *Todd v. Bourke*, 27 La. Ann. 385; *Guesnard v. Louisville & N. R. Co.*, 76 Ala. 453; *Bronnenburg v. Rinker*, 2 Ind. App. 391.

¹⁰⁸ *Bell v. McConnell*, 37 Ohio St. 396, 41 Am. Rep. 529.

¹⁰⁹ *Solomon v. Barker*, 2 Fost. & F. 726; *Boorman v. Brown*, 3 B. 511; *Shipherd v. Field*, 70 Ill. 438; *Stewart v. Muse*, 62 Ind. 85; *Lunn v. Guthrie*, 115 Iowa, 501; *Harlow v. Bartlett*, 170 Mass. 584; *Zimmermann v. Hell*, 86 Hun (N. Y.) 114; *McFarland v. McLees* (Pa.) 5 Atl. 50.

for commissions. If a broker is employed to place insurance on his principal's property, and he so negligently forms his duty that the insurance procured is of no value or he omits to place any insurance at all, or does not give his principal due notice of his failure to do so, he will be liable for the loss of the property which he has insured.¹¹⁰

If, however, a broker acts in good faith, using a reasonable degree of skill and diligence, he will not be liable for any loss occasioned by his mistake.¹¹¹ The presumption always is that the broker did his duty, and he is not required to offer any evidence to show that he exercised ordinary care until the plaintiff has shown that he was negligent.

§ 763. To act in good faith.

One of the first duties that a broker owes to his principal is to always remain loyal to the latter's interests. By reason of the fact that the client has employed him in preference to others, great confidence and trust has been reposed in him. Consequently it is his duty to do nothing that will shake or destroy that confidence and trust, but to always remain faithful and loyal to his principal's interests. This includes his duty not to undertake incompatible duties, nor to act in incongruous characters, nor to act in a transaction in which he has or represents interests adverse to those of his principal.¹¹² So it is his duty, at all times, to disclose

¹¹⁰ *Park v. Hamond*, 4 Camp. 344; *Callander v. Oelrichs*, 10 N. C. 58; *De Tastett v. Crousillat*, 2 Wash. C. C. 132, Fed. 3,828; *Shoenfeld v. Fleisher*, 73 Ill. 404; *Backus v. Ames*, 79 Minn. 145; *Thorne v. Deas*, 4 Johns. (N. Y.) 84; *Gray v. Murray*, 10 Ch. (N. Y.) 167; *Perkins v. Washington Ins. Co.*, 4 Cow. 645.

¹¹¹ *Pappa v. Rose*, L. R. 7 C. F. 32; *Gettins v. Scudder*, 77 N. H. 100; *Matthews v. Fuller*, 123 Mass. 446; *Barnard v. Coffin*, 138 Mass. 100; *Coe v. Ware*, 40 Minn. 404; *Gheen v. Johnson*, 90 Pa. 38. Or the broker may be liable for the worthlessness of security taken in the absence of an express stipulation to that effect. *Buddecke v. Harris*, 20 La. Ann. 100.

¹¹² *Backus v. Ames*, 79 Minn. 145.

¹¹³ *Taussig v. Hart*, 58 N. Y. 425; *Neuendorff v. World Mfg. Co.*, 69 N. Y. 389; *Deutsch v. Baxter*, 9 Colo. App. 58; *Hart v. Lackens*, 72 Ill. App. 442; *Everhart v. Searle*, 71 Pa. 256; *W.*

principal any facts or circumstances that may make his interests or those of another whom he represents adverse to his principal's interests or that may affect the latter in any way.¹¹⁴

If he does undertake to represent adverse interests or acts adversely to his principal in any part of the transaction, or does not disclose any interest that would naturally tend to influence his conduct of the transaction, it would be such a fraud upon the principal as would render the broker liable to the principal for any loss sustained thereby, or as would preclude the broker from recovering any compensation for his services;¹¹⁵ and it would make no difference that the

McCullough, 196 Pa. 205, 79 Am. St. Rep. 704. And see *Illingworth v. De Mott*, 59 N. J. Eq. 8.

But bad faith on the part of a broker who receives a stock certificate from the transfer clerk of a corporation, and subsequently sells it for his account, is not established by proving that the same broker had acted for the clerk in some previous similar transactions, and had there taken the precaution of first sending the certificate to the office of the corporation, and procuring a transfer to be made, which precaution had not been adopted in the case before the court, if it further appears that the broker had sent the certificate to the proper officers, and had received information that it had been duly issued and registered. *Jarvis v. Manhattan Beach Co.*, 148 N. Y. 652, 51 Am. St. Rep. 727.

¹¹⁴ *Farnsworth v. Hemmer*, 1 Allen (Mass.) 494; *Cornwell v. Foord*, 96 Ill. App. 366; *Rupp v. Sampson*, 16 Gray (Mass.) 398, 77 Am. Dec. 32; *Wilkinson v. McCullough*, 196 Pa. 205, 79 Am. St. Rep. 702. But he does not have to disclose to his principal, a prospective purchaser, that he has an option on the property, as he may abandon the option without violating any duty to the owner. *Carver v. Fisher*, 175 Mass. 9.

¹¹⁵ *Hurst v. Holding*, 3 Taunt. 32; *Hamond v. Holiday*, 1 Car. & 384; *Morison v. Thompson*, L. R. 9 Q. B. 480; *Hall v. Gambrill*, 2 Fed. 32; *Deutsch v. Baxter*, 9 Colo. App. 58; *Collins v. McClurg*, 9 Colo. App. 348; *Cornwell v. Foord*, 96 Ill. App. 366; *Hafner v. Ferron*, 165 Ill. 242; *Hampton v. Lackens*, 72 Ill. App. 442; *Fisher v. Dynes*, 62 Ind. 348; *Morey v. Laird*, 108 Iowa, 670; *Burnham v. Tipton*, 174 Mass. 408; *Emmons v. Alvord*, 177 Mass. 466; *Hobart v. Sherburne*, 66 Minn. 171; *Jansen v. Williams*, 36 Neb. 869; *Dickson v. Updike* (N. J. Err. & App.) 49 Atl. 712; *Murray v. Beard*, 102 N. Y. 505; *Carman v. Beach*, 63 N. Y. 97; *Southack v. Lane*, 32 Misc. (N. Y.) 141; *Pratt v. Patterson's Ex'rs*, 112 Pa. 475; *Wilkin-*

transaction had not resulted in an injury to the principal. Thus, if a purchaser avoids a sale made through the representations of the broker, which sale would not have been made had the broker made proper representations, he cannot recover the agreed commission therein.¹¹⁷ And if a broker understates to his principal the price he has offered for certain property of the principal with the intention of appropriating the difference in price for himself and others, and procures a conveyance at such price, he is liable in tort for which the principal may recover.¹¹⁸ But the concealment of the identity of the purchaser from his principal is not such bad faith as will preclude a broker from earning his commission on a sale of land where it does not appear that there was anything in the facts or circumstances to render that fact of any importance to the seller.¹¹⁹

So where a broker fraudulently represented to his principal, whose money he was loaning, that the security was when in fact it was not, he is liable, though the principal was in a position to have examined the security,¹²⁰ though the broker shared the money with or delivered a part of it to the pretended borrower.¹²¹ Nor can a broker deal with the subject-matter of the agency in any manner as to be to his own advantage and detriment to the interests of his principal.¹²² But if the owner, l

son v. McCullough, 196 Pa. 205, 79 Am. St. Rep. 702; *Fallon*, 11 R. I. 311, 23 Am. Rep. 458; *Ryan v. Kahler* (100 App.) 46 S. W. 71; *Segar v. Parrish*, 20 Grat. (Va.) 672; *Harvey v. Hochbrunn*, 24 Wash. 206. And see *Harvey v. Lindsay*, 100 S. W. 267; *Gorman v. Hargis*, 6 Okl. 360; *Courtney v. Continental & Cattle Co.*, 17 Mont. 394; *Bloomington v. Hodges*, 21 N. Y. 6.

¹¹⁶ *Hafner v. Herron*, 165 Ill. 242; *Crockett v. Grayson*, 100 Ill. 354.

¹¹⁷ *Crockett v. Grayson*, 98 Va. 354.

¹¹⁸ *Emmons v. Alvord*, 177 Mass. 466.

¹¹⁹ *Veasey v. Carson*, 177 Mass. 117.

¹²⁰ *Rubens v. Mead* (Cal.) 53 Pac. 432.

¹²¹ *Rubens v. Mead* (Cal.) 53 Pac. 432.

¹²² See *Atlee v. Fink*, 75 Mo. 100, 42 Am. Rep. 385; *Davis v. Lin*, 108 Ill. 39, 48 Am. Rep. 541; *Pegram v. Charlotte & Atlantic*, 84 N. C. 696, 37 Am. Rep. 639; *Cornwell v. Foord*, 96 Ill. 100.

that the broker had made an arrangement for the advantage of the purchaser, sells to the latter, he cannot refuse to pay the broker's commissions,¹²³ nor claim the profit made by the purchaser.¹²⁴

So it is the broker's duty to disclose to his principal anything that may come to his knowledge, and which affects his principal's interests, whether to his advantage or disadvantage. Thus, where a broker, authorized to sell or exchange property on specified terms and prices, learns that a more advantageous sale or exchange can be made, of which the principal is ignorant, it is his duty to disclose such fact to his principal before the sale or exchange as authorized is made, and if he fails to make such disclosure, he is guilty of fraud.¹²⁵

764. Cannot buy from or sell to himself.

So where a broker is employed to buy or sell property, it is his duty to buy and sell for his principal alone, and it would be fraudulent for himself to be the purchaser from¹²⁶ or seller to the principal¹²⁷ without the latter's full and free consent; and the principal could repudiate the transaction and either recover the property or the money which he had advanced,¹²⁸ although the broker acted honestly and

¹²³ *Hafner v. Herron*, 165 Ill. 242.

¹²⁴ *Kavanaugh v. Ballard*, 21 Ky. L. R. 1683, 56 S. W. 159.

¹²⁵ *Holmes v. Cathcart*, 88 Minn. 213.

¹²⁶ *Stewart v. Mather*, 32 Wis. 344; *Fry v. Platt*, 32 Kan. 62; *Tilley v. Wolverton*, 46 Minn. 256; *Merriam v. Johnson*, 86 Minn. 100; *Hughes v. Washington*, 72 Ill. 84; *Francis v. Kerker*, 85 Ill. 190; *Armstrong v. O'Brien*, 83 Tex. 635; *Colbert v. Shepherd*, 89 Va. 101. And a clerk of the broker employed to make sale of land, who has access to the correspondence between his principal and the vendor, stands in such a relation of confidence to the latter that when he becomes the purchaser, he is chargeable as trustee for the vendor, and must reconvey or account for the value of the land. *Gardner v. Ogden*, 22 N. Y. 327, 78 Am. Dec. 192.

¹²⁷ *Taussig v. Hart*, 58 N. Y. 425; *Conkey v. Bond*, 36 N. Y. 427; *Donnor v. Black*, 119 Mo. 126.

¹²⁸ *Taussig v. Hart*, 58 N. Y. 425; *Clark v. Bird*, 66 App. Div. (N. Y.) 284; *Francis v. Kerker*, 85 Ill. 190; *Bookwalter v. Lansing*, Neb. 291.

in good faith, and in fact did better for his principal than he would have done had he acted otherwise.¹²⁹ The general principle will be acknowledged, that a person cannot at the same time be agent for the seller to make the sale and purchaser of the property to be sold. "The relations are wholly incompatible with each other, and cannot be combined in the same person. The law will not permit it. Assuming the character of purchaser, the person so acting necessarily abandons that of agent, and can claim nothing in the latter capacity in his negotiations with his former principal. The reason of the rule is very plain. It is the interest of the party as purchaser, being adverse to that of his principal, supposing the agency still to continue, and most naturally would lead to a violation of his duty as agent. If a case can be presented, however, not violating the reason of the rule, as of an agency limited to a sale anterior to the purchase, or where the agency may be presumed to have expired, or the duties to have been performed, at the time the purchase takes place, to such a case it is presumed the rule would be inapplicable."¹³⁰

Thus a broker cannot by fraud, as against his principal, negotiate a sale of realty as to get the title to the same in himself,¹³¹ although in the absence of fraud, and with the consent of the principal, a broker may sell to a third party, and then receive a conveyance of the realty back to himself. Though in the absence of such consent or ratification by the principal, if the broker is himself the purchaser, through the medium of a third party, he is accountable to the owner for any profit realized from the sale of the property.¹³² No broker can justify his so dealing with himself by usage of trade, unless he shows that the principal had such knowledge that he could be presumed to have contracted with the

¹²⁹ *Taussig v. Hart*, 58 N. Y. 425.

¹³⁰ *Stewart v. Mather*, 32 Wis. 350.

¹³¹ *Bookwalter v. Lansing*, 23 Neb. 291; *Green v. Knoch*, 99 Neb. 26.

¹³² *Bookwalter v. Lansing*, 23 Neb. 291. But see *Hughes v. Kingston*, 72 Ill. 84; *Smith v. Townsend*, 109 Mass. 500.

¹³³ *Merriam v. Johnson*, 86 Minn. 61.

with reference to it.¹³⁴ If the broker thus deals with himself he cannot recover commissions in such case,¹³⁵ although he does so with the principal's consent, unless there is an agreement for commissions.¹³⁶ After the termination of the relation, however, the broker has the same right as any other person to deal in the property of the principal.¹³⁷

765. Duty not to act for both parties.

(a) **In general.**—It is the duty of a broker, like all other agents, to act only, in the same transaction, for the party who employs him, and not to represent the other party also unless the principal consents thereto. When the principal employs him, he is entitled to the benefit of his full skill, knowledge and advice, unless he contracts otherwise. The principal may, of course, knowingly consent that the broker may also act for the other party in the same transaction, but unless he does so consent, the broker must act for him alone and not take upon himself a double agency.¹³⁸ Thus

¹³⁴ *Farnsworth v. Hemmer*, 1 Allen (Mass.) 494, 79 Am. Dec. 758; *Com. v. Cooper*, 130 Mass. 288; *Walker v. Osgood*, 98 Mass. 348, 93 Am. Dec. 168; *Raisin v. Clark*, 41 Md. 158, 20 Am. Rep. 66; *Robinson v. Mollett*, 44 Law J. C. P. 362.

¹³⁵ *McGar v. Adams*, 65 Ala. 106; *Jansen v. Williams*, 36 Neb. 869; *Hammond v. Bookwalter*, 12 Ind. App. 177. See post, § 781.

¹³⁶ *Hammond v. Bookwalter*, 12 Ind. App. 177; *Stewart v. Mather*, 2 Wis. 344.

¹³⁷ *Oberlin College Trustees v. Blair*, 45 W. Va. 812.

¹³⁸ *Robbins v. Sears*, 23 Fed. 874; *Bates v. Copeland*, MacArthur M. (D. C.) 50; *Fitzsimmons v. Southern Exp. Co.*, 40 Ga. 330, Am. Rep. 577; *Alexander v. Northwestern Christian University*, 7 Ind. 466; *Leekins v. Nordyke*, 66 Iowa, 471; *Hinckley v. Arey*, 7 Me. 362; *Raisin v. Clark*, 41 Md. 158, 20 Am. Rep. 66; *Maryland Ins. Co. v. Dalrymple*, 25 Md. 242, 89 Am. Dec. 779; *Rice v. Wood*, 113 Mass. 133, 18 Am. Rep. 459; *Walker v. Osgood*, 98 Mass. 348, 93 Am. Dec. 168; *Farnsworth v. Hemmer*, 1 Allen (Mass.) 494, 79 Am. Dec. 756; *Rupp v. Sampson*, 16 Gray (Mass.) 398, 77 Am. Dec. 416; *Scribner v. Collar*, 40 Mich. 375, 29 Am. Rep. 541; *Webb v. Paxton*, 36 Minn. 532; *Collins v. Fowler*, 8 Mo. App. 588; *Rosenthal v. Drake*, 82 Mo. App. 358; *Murray v. Beard*, 102 N. Y. 505; *Lyon v. Mitchell*, 36 N. Y. 235, 93 Am. Dec. 502; *Rowe v. Stevens*, 53 N. Y. 621; *Sumner v. Charlotte, C. & A. R. Co.*, 78 N. C. 339; *Bell v. McConnell*, 37 Ohio St. 396, 41 Am. Rep. 528; *United*

where a broker acted for both parties to a sale of property it was said: "The law does not allow a man to be in such relations so essentially inconsistent and repugnant to each other. The duty of an agent for the vendor is to sell the property at the highest price; of the agent of the purchaser to buy it for the lowest. These duties are so utterly incompatible and conflicting that they cannot be performed by the same person without great danger that the rights of the principal will be sacrificed to promote the interests of the other, or that neither of them will enjoy the benefit of the discreet and faithful exercise of the trust reposed in the agent. As it cannot be supposed that a vendor and a purchaser would employ the same person to act as their agent to buy and sell the same property, it is clear that it would be as a surprise on both parties, and is a breach of the trust and confidence intended to be reposed in the agent by each respectively, if his intent to act as agent of both in the same transaction is concealed from them. It is of the essence of his contract that he will use his best skill and judgment to promote the interest of his employer. This he cannot do when he acts for two persons whose interests are essentially adverse. He is therefore guilty of a breach of his contract. Nor is this all. He commits a fraud on his principal in his undertaking, without their assent or knowledge, to act as their mutual agent because he conceals from them and

States Rolling Stock Co. v. Atlantic & G. W. R. Co., 34 O. 450, 32 Am. Rep. 380; *Everhart v. Searle*, 71 Pa. 256; *L. Fallon*, 11 R. I. 311, 23 Am. Rep. 458; *Ferguson v. Gooch*, 99 Me. 100; *Meyer v. Hanchett*, 43 Wis. 246; *Stewart v. Mather*, 32 Wis. 100.

"When an agent is thus employed by one party to sell and another to purchase, and is vested with any discretion or judgment in the negotiation, his duties are in conflict and in respect to the opposite interests, and he cannot fairly serve both parties. In such a case it is his duty to obtain the best possible price for the property and the lowest possible terms for the buyer. If the contract is made by the employment of the agent by one party and he is employed and pay a compensation by either party is made with the knowledge and assent of the agent's employment by the other in the same transaction, of course he cannot complain, and he must be held to pay the compensation agreed upon; but when otherwise it is a fraud upon the party, and he is exempt from liability as agent." *Barry v. Schmidt*, 57 Wis. 172, 46 Am. Rep. 36.

fact entirely within his own knowledge, which he was bound, in the exercise of good faith, to disclose to them."¹³⁹

One who employs a broker to find a customer to exchange or sell real estate with him has the right to assume that he is acting solely in his interest, and is not to receive a commission from the customer.¹⁴⁰ If the one principal employing him knows that he is employed by the other principal, then both he and the broker are guilty of wrong committed against the other principal, and the law will not enforce an executory contract entered into in fraud of the rights of the first employer.¹⁴¹ It is no answer in such a case to say that the second employer having knowledge of the first employment should be held liable on his promise, because he could not be defrauded in the transaction.¹⁴² The transaction itself is void as against public policy and good morals and both parties thereto being in *pari delicto*, the law will leave them as it finds them.¹⁴³

(b) Knowledge thereof by both parties.—If, however, both parties have knowledge that the broker is acting for them both, and do not object thereto, but allow him to act, and agree to pay him commissions they will be held to have assented to his acting in a double capacity and neither party can object thereafter.¹⁴⁴ There is, however,

¹³⁹ By Bigelow, C. J., in *Farnsworth v. Hemmer*, 1 Allen (Mass.) 494, 79 Am. Dec. 757.

¹⁴⁰ *Hannan v. Prentiss*, 124 Mich. 417.

¹⁴¹ *Bell v. McConnell*, 37 Ohio St. 396, 41 Am. Rep. 530; *Ralsin v. Clark*, 41 Md. 158, 20 Am. Rep. 66; *Farnsworth v. Hemmer*, 1 Allen (Mass.) 494, 79 Am. Dec. 756; *Rice v. Wood*, 113 Mass. 133, 18 Am. Rep. 459; *Walker v. Osgood*, 98 Mass. 348, 93 Am. Dec. 168; *Smith v. Townsend*, 109 Mass. 500; *Everhart v. Searle*, 71 Pa. 256; *Wynch v. Fallon*, 11 R. I. 311, 23 Am. Rep. 458.

¹⁴² *Bell v. McConnell*, 37 Ohio St. 396, 41 Am. Rep. 528.

¹⁴³ *Bell v. McConnell*, 37 Ohio St. 396, 41 Am. Rep. 528.

¹⁴⁴ *Bell v. McConnell*, 37 Ohio St. 396, 41 Am. Rep. 528; *United States Rolling Stock Co. v. Atlantic & G. W. R. Co.*, 34 Ohio St. 450, 18 Am. Rep. 380; *Alexander v. North Western Christian University*, 100 Ind. 466; *Rice v. Wood*, 113 Mass. 133, 18 Am. Rep. 528; *Scribner v. Collar*, 40 Mich. 375, 29 Am. Rep. 543; *De Stelger v. Hollingsworth*, 17 Mo. App. 382; *Rowe v. Stevens*, 53 N. Y. 621; *Pugsley v. Murray*, 4 E. D. Smith (N. Y.) 245. But see *Ralsin v. Clark*, 41

a want of harmony in the decisions on this point, the decided current of authority is in favor of the validity of such contracts where the consent of both principals is shown. If such double agency is clearly proved.¹⁴⁵ But if

Md. 158, 20 Am. Rep. 66; *Lynch v. Fallon*, 11 R. I. 311, 23 A. 458.

¹⁴⁵ *Bell v. McConnell*, 37 Ohio St. 396, 41 Am. Rep. 531. by McIlvaine, J., in this case: "We admit that all such transactions should be regarded with suspicion; but where full knowledge and consent of all parties interested are clearly shown we find no public policy or principle of sound morality which can be violated. It seems to us rather that public policy requires that contracts fairly entered into by parties competent to contract should be enforced where no public law has been violated and no corrupt purpose or end is sought to be accomplished. The broker may not be able to serve each of his principals with equal skill and energy. He may not be able to obtain for his principal the highest price which could be obtained, or for the purchaser the lowest price for which it could be purchased; but he can render to each a service entirely free from falsehood and fraud; a fair and valuable service in which his best judgment and his soundest discretion are fully and freely exercised. And in every case, such service is all that either of his principals contracts for. Undoubtedly if two persons desire to negotiate an exchange, a bargain and sale of property, they may agree to delegate to a third person the power to fix the terms, and no suspicion of a violation of public policy would arise. It may be said that such third person is an arbitrator chosen to settle differences between his employers, and an agency or office greatly favored in the law. And so it is. * * * True, in the case put, the contracting parties deal directly with each other, and in the case at bar their minds meet through the medium of a third person in whose judgment and discretion they mutually repose confidence. His judgment and discretion are invoked by each to aid in fixing the terms of a contract between them. And after the terms are thus adjusted through the agency of their mutual agent and ratified by the parties, in the free exercise of their own volitions, to hold that the relation between such agent and either of his principals is in violation of a sound public policy supposed to rest on some moral abstraction would be a refinement in legal ethics too subtle for my comprehension.

"Of course to relieve such double agent from suspicion and to make his consistent duties have been assumed, which prima facie is presumed, it is necessary that it should appear that knowledge of every circumstance connected with his employment by one principal should be communicated to the other in so far as the same

erty knows that the broker is acting for the other, it is fraudulent for the broker to so act, and any contract made with him when so acting could be avoided at the election of either party,¹⁴⁶ and the broker would not be entitled to any commissions thereon, or if the commission had been paid, each party would have a right of action against the broker for the amount so paid and for damages sustained.¹⁴⁷

To a certain extent, however, and for certain purposes, by the understanding and usages of business, and the nature of the employment, a broker may act for both parties. But what he does in that relation he does as an indifferent person, and not in the interest of either party. Every one who employs him is presumed to know and consent that to that extent, and for such purposes, he may so act.¹⁴⁸ Thus as soon as he negotiates with another as vendee, he becomes the agent of the latter for the purpose of receiving and transmitting propositions. So, also, he is the agent of both parties for the purpose of making the memorandum required by the statute of frauds.¹⁴⁹

— **As middleman.** In some cases it is held that where the broker acts merely as a middleman to bring the parties together, he exercising no discretion or judgment or taking no part whatever in the negotiations between the parties, but leaving them to do the bargaining themselves, he may act for both parties although neither party knew that he was acting

naturally affect his action; but when that is done and free assent is given by each principal to the double relation of the agent, the want of such agent to compensation cannot be denied on any just principle of morals or of law."

¹⁴⁶ *Wassell v. Reardon*, 11 Ark. 705, 54 Am. Dec. 245; *Bates v. Meland*, *MacArthur & M.* (D. C.) 50; *Hinckley v. Arey*, 27 Me. 362; *Farnsworth v. Hemmer*, 1 Allen (Mass.) 494, 79 Am. Dec. 756; *Hibner v. Collar*, 40 Mich. 375, 29 Am. Rep. 541; *Herman v. Marceau*, 1 Wis. 151, 60 Am. Dec. 368.

¹⁴⁷ *Post*, § 781.

¹⁴⁸ *Walker v. Osgood*, 98 Mass. 348, 93 Am. Dec. 169.

¹⁴⁹ *Simon v. Motivos*, 3 Burrow, 1921; *Rucker v. Cammeyer*, 1 Har. 105; *Hinckley v. Arey*, 27 Me. 362; *Colvin v. Williams*, 3 Har. (Md.) 38, 5 Am. Rep. 417; *Schlesinger v. Texas & St. L. R.* 87 Mo. 146; *Barry v. Schmidt*, 57 Wis. 172, 46 Am. Rep. 35.

C. & S.—104.

for the other.¹⁵⁰ But even in such cases there is some doubt in the authorities, and it is believed that it must clearly appear that the broker did not act as agent for either, and had only been employed to bring together certain persons. It is believed that the distinction is not a mere principle, for even if he had no authority to bind the principal, and was intrusted with no discretion in fixing the terms of the transaction, and his only service was to bring the parties together, he was bound to perform that service in the interest of the party who employed him, and was subject to the temptation to bring together those who might employ him, to the exclusion of others who might employ him on better terms.¹⁵¹

§ 766. Duty to account.

It is the duty of a broker to keep an accurate record of all transactions and proceedings entered into by him on behalf of his principal; and within a reasonable time, on demand, to account for all profits, after deducting commissions, missions, and charges, made by him in contracts entered into for his principal.¹⁵² He cannot deal with the matter of his employment to his own advantage, as has been seen heretofore, but must account to his principal for the profit that is made in the transaction. Thus, if he sells for more¹⁵³ or buys for less¹⁵⁴ than the stipulated

¹⁵⁰ *Rupp v. Sampson*, 16 Gray (Mass.) 398, 77 Am. Dec. 100; *Mullen v. Keetzleb*, 7 Bush (Ky.) 253; *Siegel v. Gould*, 7 N. Y. 177; *Pollatschek v. Goodwin*, 17 Misc. (N. Y.) 587; *Gottfried Krueger Brew. Co.*, 142 N. Y. 70; *Herman v. ...*, 1 Wis. 151, 60 Am. Dec. 368; *Orton v. Scofield*, 61 Wis. 382.

¹⁵¹ *Walker v. Osgood*, 98 Mass. 348, 93 Am. Dec. 168; *S. Collar*, 40 Mich. 375, 29 Am. Rep. 543.

¹⁵² *Payne v. Waterston*, 16 La. Ann. 239; *Haas v. Damo*, 589; *Bate v. McDowell*, 49 N. Y. Super. Ct. 106.

¹⁵³ *Love v. Hoss*, 62 Ind. 255; *De Bussche v. Alt*, 8 Ch. 387; *Collins v. McClurg*, 1 Colo. App. 348; *Lewis v. Denison*, 2 Ill. 387; *Kellogg v. Keeler*, 27 Ill. App. 244; *Merryman v. Day*, 404; *Stoner v. Welser*, 24 Iowa, 434; *Tilleny v. Wolverton*, 256.

¹⁵⁴ *Morison v. Thompson*, L. R. 9 Q. B. 480; *Thompson*, 7 Times Law R. 698; *Cottom v. Holliday*, 59 Ill. 179;

st account to his principal for the difference. And he not set up as a defense, to an action for the proceeds, the t that the transaction in which he was employed was an gal one.¹⁵⁵ When a stockbroker makes entries, in his ks, of purchases of stocks for his customers, and renders them statements showing that he has bought and holds for m certain stocks, giving names, prices, and the standing he account, the customers, believing and acting upon such ements, may treat them as true, and the broker is es- ped to deny them.¹⁵⁶

V. LIABILITIES OF PRINCIPAL TO BROKER.

67. For compensation—In general.

Where a broker has performed services for his principal, is entitled to receive compensation therefor.¹⁵⁷ This compensation ordinarily takes the form of a commission or kerage on the price or value of the thing sold or ex- enged, his right to which will depend upon the terms of employment and the performance of the service under h employment.¹⁵⁸ The one who employs the broker will liable for the commissions, whether he holds the subject- tter of the brokerage in his own name or as trustee, or is ther broker,¹⁵⁹ unless there is an understanding between principal and his broker that the latter is to receive his

iser, 24 Iowa, 434; Morrison v. Ogdensburgh & L. C. R. Co., 52 b. (N. Y.) 173.

¹⁵⁵ Pearce v. Foote, 113 Ill. 229, 55 Am. Rep. 414; Pointer v. Smith, eisk. (Tenn.) 137; Tenant v. Elliott, 1 Bos. & P. 3.

¹⁵⁶ In re Pearson's Estate, 19 App. Div. (N. Y.) 478.

¹⁵⁷ Guesnard v. Louisville & N. R. Co., 76 Ala. 453; Paulsen v. lett, 2 Daly (N. Y.) 40.

¹⁵⁸ Goodspeed v. Robinson, 1 Hilt. (N. Y.) 423; Jacobs v. Kolff, Hilt. (N. Y.) 133; Read v. Rann, 10 Barn. & C. 438; Broad v. mas, 7 Bing. 99; Quiggle v. Prouty (Cal.) 45 Pac. 676; Cham- n Iron Fence Co. v. Bradley, 10 Ill. App. 328; Crane v. Eddy, 191 645. See post, §§ 769, 770.

¹⁵⁹ Jones v. Adler, 34 Md. 440; Landsberger v. Murray, 6 Misc. Y.) 605; Jarvis v. Schaefer, 105 N. Y. 289; Whiting v. Saunders, Misc. (N. Y.) 332; In re Wiseman's Estate, 7 Pa. Dist. R. 759, Wkly. Notes Cas. 334.

compensation from the other party to the transaction. a provision, in the contract of employment, that the commission shall be paid out of the first cash payment, is not a condition precedent to the broker's right to receive commissions, and does not mean that, unless there is a payment, there is no commission.¹⁶¹ A broker for the sale of land, who agreed to pay other brokers a certain percentage of his own commissions if they sold at a certain price, who had no interest in the land, as such brokers are not liable to them for commissions on a sale at a less

§ 768. Amount—How determined.

Where the broker and his principal have, in the contract of employment, specially agreed upon what commission the former shall receive for his services, the amount of the broker's compensation will be determined by such agreement, and evidence of a custom cannot be introduced to vary such amount.¹⁶⁴ In the absence, however, of an agreement as to the amount of the broker's commission, evidence of custom or usage in like cases at the same time and place may be introduced to determine such amount.

¹⁶⁰ Where the principal tells the broker that he must look to the purchaser for his compensation for making the sale, and no other else is ever said about compensation, the broker cannot recover commissions from the principal. *King v. Benson*, 22 Mo. App. 263.

¹⁶¹ *Finch v. Guardian Trust Co.*, 92 Mo. App. 263.

¹⁶² *Whitcomb v. Dickinson*, 169 Mass. 16.

¹⁶³ *Sayre v. Wilson*, 86 Ala. 151; *Ford v. Brown*, 120 Ala. 1; *Duncan v. Borden*, 13 Colo. App. 481; *Illingsworth v. Smith*, 111 Ill. App. 612; *Diltz v. Spahr*, 16 Ind. App. 591; *McDermott v. Smith*, 106 Iowa, 749; *Deford v. Shephard*, 6 Kan. App. 428; *West v. Smith*, 19 Ky. L. R. 1480, 43 S. W. 467; *Parker v. Merrill*, 173 Mich. 1; *Culver v. Nester*, 116 Mich. 191; *Salmon v. Jobbins*, 10 N. Y. 624; *Jenkins v. Darling* (Tex. Civ. App.) 56 S. W. 1026; *Webb v. Barclay* (Tex. Civ. App.) 40 S. W. 1026; *Backus v. Claridge* (Tex. Civ. App.) 42 S. W. 1005; *Edward H. Evered v. Cumberland Glass Mfg. Co.*, 112 Wis. 544.

¹⁶⁴ *Bower v. Jones*, 8 Bing. 65; *Jefferson v. Burhans*, 85 Mo. 1; *Ware v. Hayward Rubber Co.*, 3 Allen (Mass.) 84; *Edwards v. Goldsmith*, 16 Pa. 43; *Potts v. Aechternacht*, 93 Pa. 138; *Calland v. Trapet*, 70 Ill. App. 228.

¹⁶⁵ *Kock v. Emmerling*, 22 How. (U. S.) 69; *Sayre v. Wilson*.

the broker bases his claim to commissions on a usage, it incumbent on him to prove such usage,¹⁶⁶ and to show that it was notorious, or within the knowledge of the principal when he dealt with the broker.¹⁶⁷ But if there has been no special commission agreed upon, and no custom or usage can be shown, then the broker is entitled to recover for his services as reasonably worth.¹⁶⁸ Thus, if there is testimony in a case which tends to show that the broker had rendered part of his service but did not effect a sale, it is not improper for the court to instruct the jury that if they believe that the broker rendered some service he is entitled to recover on a quantum meruit.¹⁶⁹ But if the services are performed in such a manner that they are of no benefit to the principal, the broker is not entitled to recover commissions, or any compensation whatever for his services.¹⁷⁰ In estimating the commission, the actual and not the market or trade or fictitious value of the property bought and sold is to be taken into consideration.¹⁷¹

1. 151; *Deshler v. Beers*, 32 Ill. 368; *Goode v. Chicago, R. I. & P. Co.*, 92 Iowa, 371; *Thomas v. Brandt* (Md.) 26 Atl. 524; *Ashby v. Holmes*, 68 Mo. App. 23; *Kennedy v. Somerville*, 64 Mo. App. 76; *Organ v. Mason*, 4 E. D. Smith (N. Y.) 636; *Potts v. Aechternacht*, 93 Pa. 138; *Arrington v. Cary*, 5 Baxt. (Tenn.) 609; *Hansbrough v. Neal*, 94 Va. 722.

¹⁶⁶ *Read v. Rann*, 10 Barn. & C. 438; *Loud v. Hall*, 106 Mass. 404; *Clark v. Welch*, 9 Allen (Mass.) 350. Evidence necessary to establish a custom in reference to a broker's commissions where he was the efficient cause of the sale must be clear and such as will establish a custom reasonable and ancient, uncontradicted, notorious, and distinct. *Pratt v. Bank*, 12 Phila. (Pa.) 378.

¹⁶⁷ *Blake v. Stump*, 73 Md. 160, 170; *Patterson v. Crowther*, 70 N. Y. 125.

¹⁶⁸ *Guesnard v. Louisville & N. R. Co.*, 76 Ala. 453; *Brand v. Merriam*, 15 Colo. 286; *Carruthers v. Towne*, 86 Iowa, 318; *Hollis v. Weston*, 156 Mass. 357; *Gregg v. Loomis*, 22 Neb. 174; *Baer v. Koch*, 10 Misc. (N. Y.) 334; *Potts v. Aechternacht*, 93 Pa. 138; *Arrington v. Cary*, 5 Baxt. (Tenn.) 609.

¹⁶⁹ *McMurtry v. Madison*, 18 Neb. 291.

¹⁷⁰ *Hammond v. Holliday*, 1 Car. & P. 384; *Hoffman v. Livingston*, 1 N. Y. Super. Ct. 552.

¹⁷¹ *Boyd v. Watson*, 101 Iowa, 214; *Porter v. Hellingsworth*, 30 N. Y. 628. See, also, *Culver v. Nester*, 116 Mich. 191.

If the brokers are induced by fraudulent representation of the principal to accept part payment of their commissions in satisfaction of the amount due them by the principal, they are entitled to rescind the agreement for satisfaction and to recover the full amount of commissions which have been lawfully accrued by reason of a sale effected by the principal without their knowledge.¹⁷²

§ 769. Right to compensation in general—Necessity of employment.

In order, however, for a broker to be entitled to commissions from his principal for services performed, he must first show that such services were performed in the employment of himself, as broker, by the principal or by a previous contract¹⁷³ or by the principal accepting and adopting his acts.¹⁷⁴ Services rendered as a mere volunteer, without any express or implied request, give no right to commissions.¹⁷⁵ Thus a broker who has

¹⁷² Dobinson v. McDonald, 92 Cal. 33.

¹⁷³ Castner v. Richardson, 18 Colo. 496; Merrill v. Lathrop, 18 App. 263; Atwater v. Lockwood, 39 Conn. 45; Weinhouse v. Mullen, 68 Conn. 250; Mullen v. Bower, 22 Ind. App. 294; Thomas v. Field, 7 Kan. App. 669; West v. Prewitt, 19 Ky. L. R. 1; W. 467; Cook v. Welch, 9 Allen (Mass.) 350; Nolan v. Mich. 56; Coffin v. Linxweller, 34 Minn. 320; Crosby v. Lake Ice Co., 74 Minn. 82; Hinds v. Henry, 36 N. J. Illingworth v. De Mott, 59 N. J. Eq. 8; Longstreth v. K. J. Law, 112; Callaway v. Equitable Trust Co., 67 N. J. Sibbald v. Bethlehem Iron Co., 83 N. Y. 378, 38 Am. Rep. v. Frost, 49 App. Div. (N. Y.) 176; Fowler v. Hoschke, 53 (N. Y.) 327; Loeffler v. Friedman, 26 Misc. (N. Y.) 750; Johnson, 68 Pa. 42; Twelfth St. Market Co. v. Jackson, 269; Earp v. Cummins, 54 Pa. 394, 93 Am. Dec. 718; Wanamaker, 185 Pa. 536; Pipkin v. Horne (Tex. Civ. A. W. 1000.

¹⁷⁴ Holly v. Gosling, 3 E. D. Smith (N. Y.) 262; Hoschke, 53 App. Div. (N. Y.) 327; Low v. Connecticut Co., 46 N. H. 284; Keys v. Johnson, 68 Pa. 42; Twelfth St. Co. v. Jackson, 102 Pa. 269.

¹⁷⁵ Pierce v. Thomas, 4 E. D. Smith (N. Y.) 354; Go Robinson, 1 Hilt. (N. Y.) 423; Hamilton v. Gillender, 26 (N. Y.) 156; Cook v. Welch, 9 Allen (Mass.) 350; Hinds 36 N. J. Law, 328.

employed to negotiate a sale cannot recover commissions for a sale made after his authority has been revoked and notice of such revocation received by him as such services must be deemed to be voluntary.¹⁷⁶ It would be otherwise had he received no notice.¹⁷⁷ So where a real estate agent, without being employed by the owner of premises, introduced to him a person who afterwards rented the premises, and rendered some other assistance without the owner's knowledge or request, he is not entitled to commissions from such owner for his services.¹⁷⁸

According to some authorities, a broker can recover no commission for selling real estate, unless his authority to do so, or some note or memorandum thereof, was in writing.¹⁷⁹ Thus, under the New Jersey statute of frauds, providing that no real estate agent selling land shall be entitled to any commission therefor unless the authority for selling is in writing, no compensation can be recovered for selling land under an oral employment.¹⁸⁰ So the New York statute provides that in cities of the first or second class, a real estate broker who sells real property without the written authority of the owner can recover no commissions; and that a person offering real estate for sale in such cities without such authority is guilty of a misdemeanor.¹⁸¹ The provision of the statute, however, which prohibits them from claiming commissions unless their authority to sell is in writing, applies only to brokers who have authority to make the sale; it does not apply to one given no authority to fix the price or terms of sale, but who is simply employed to find and bring a pos-

¹⁷⁶ *Brown v. Pforr*, 38 Cal. 550; *Alden v. Earle*, 56 N. Y. Super. Ct. 366; *Neal v. Lehman*, 11 Tex. Civ. App. 461; *Young v. Trainor*, 58 Ill. 428; *Warwick v. Slade*, 3 Camp. 127; *Fairchild v. Cunningham*, 84 Minn. 521.

¹⁷⁷ *Bash v. Hill*, 62 Ill. 216; *Lamson v. Sims*, 48 N. Y. Super. Ct. 31.

¹⁷⁸ *McVickar v. Roche*, 74 App. Div. (N. Y.) 397.

¹⁷⁹ *King v. Benson*, 22 Mont. 256; *McCarthy v. Loupe*, 62 Cal. 99; *Myres v. Surryhue*, 67 Cal. 657; *McGeary v. Satchwell*, 129 Cal. 389; *Dolan v. O'Toole*, 129 Cal. 488; *Longstreth v. Korb*, 64 N. J. Law, 112; *Ballou v. Bergvendsen*, 9 N. D. 285.

¹⁸⁰ *Goldstein v. Scott*, 76 App. Div. (N. Y.) 78.

¹⁸¹ *Laws* 1901, c. 128; *Whiteley v. Terry*, 39 Misc. (N. Y.) 93.

sible purchaser to the vendor and to receive compensation in case a sale is effected.¹⁸²

§ 770. *Necessity of performance.*

And not only must the broker establish his employment as broker, but as a general rule he must also show that he has completed the transaction which he undertook to perform, subject, however, to such qualifications as shall be hereafter. If he does not show a full performance of the part, or a good excuse therefor, he will not be entitled to his commission.¹⁸³ His right to compensation attaches only when he has completed his service and not until the transaction is complete. Or perhaps a better statement of the doctrine would be that although a broker is not usually entitled to his commission until the transaction which he undertook to perform is complete, yet if he has faithfully performed his part in the transaction, and from no fault of his own, but from independent causes, the contract is not consummated, though he will be entitled to his commissions.¹⁸⁵ But unless he has been successful in carrying on the transaction for which he was employed, as where he is employed to find a purchaser for his principal, he is never entitled to recover on a quantum meruit.¹⁸⁶ "The very essence of a brokerage commission is that it is dependent upon success, and that it is in no way dependent upon, or affected by, the amount

¹⁸² *Knauss v. Gottfried Krueger Brew. Co.*, 142 N. Y. 70.

¹⁸³ *McGavock v. Woodlief*, 20 How. (U. S.) 221; *Gottfried v. Jennings*, 1 La. Ann. 5, 45 Am. Dec. 70; *Lestrade v. Vanzant*, 1 La. Ann. 399; *Blanc v. New Orleans Imp. & B. Co.*, 2 Rob. 1; *Didion v. Duralde*, 2 Rob. (La.) 163; *Drury v. Newman*, 256; *Antisdell v. Canfield*, 119 Mich. 229; *Jacobs v. Kolb*, 133 (N. Y.) 133; *Pratt v. Patterson*, 7 Phila. (Pa.) 135; *Ames v. Drury*, 107 Wis. 531. A broker is entitled to commission, as agreed, where he furnishes a contractor with information by which the contractor enters into a contract for the erection of a building. *Kaestner v. Oldham*, 102 Ill. App. 372.

¹⁸⁴ *Veazie v. Parker*, 72 Me. 443.

¹⁸⁵ *Van Lien v. Byrnes*, 1 Hilt. (N. Y.) 133; *Paulsen v. Daly* (N. Y.) 40; *Hagar v. Donaldson*, 154 Pa. 242; *Neafie*, 151 Pa. 392.

¹⁸⁶ *Cadigan v. Crabtree*, 179 Mass. 474, 88 Am. St. Rep.

done by the broker. A brokerage commission is earned if the broker, without devoting much, or any, time to hunting up a customer, succeeds in procuring one; and it is equally true, on the other hand, not only that no commission is earned if a broker is not successful, but a broker is not entitled to any compensation, no matter how much time he has devoted to finding a customer," if his efforts are not successful.¹⁸⁷

§ 771. Sufficiency of performance—In general.

As to what shall constitute such performance as will entitle the broker to recover his commissions cannot, however, be set forth in any definite rule. The circumstances and agreements between the parties are so varying and indefinite in the different cases that it is a matter of some difficulty to determine just what amounts to sufficient performance by the broker in each case. It may be that the parties have entered into an express agreement, making the payment of commissions dependent upon some contingency or condition, or there may be an implied agreement to that effect; or again there may be a stipulation that the contract shall be completed within a specified time, and in such cases the conditions, contingencies, or stipulations must be complied with, before the broker can claim commissions.¹⁸⁸ As to whether, then, the services rendered by a broker in any particular case amount to such a performance as will entitle him to his commissions must be determined from the facts and circumstances of that case. While there is no general rule as to performance that can be applied to brokers as a class, yet, as to certain particular classes of brokers, there are decisions that amount to general rules in regard to the cases usually arising among that class of brokers. As, perhaps, the majority of reported cases have arisen among real estate brokers, it may be well to treat briefly of that class, as an

¹⁸⁷ *Cadigan v. Crabtree*, 179 Mass. 480, 88 Am. St. Rep. 399.

¹⁸⁸ *White v. Molloy*, 9 App. Div. (N. Y.) 101; *McPhail v. Buell*, 7 Cal. 115; *Rand v. Cronkrite*, 64 Ill. App. 208; *Halprin v. Schachne*, 5 Misc. (N. Y.) 797; *Cobb v. Kenner* (Tenn. Ch. App.) 42 S. W. 77.

aid to cases in other classes. But even in this class commissions are not in harmony on the different points.

— **Real estate broker.** As a general rule, a broker employed to sell or exchange real estate or other property obtain a purchaser therefor performs his duty and is entitled to his commissions, when he finds, and introduces to the principal, a person who is ready, able, and willing to purchase on exchange on the terms proposed by or acceptable to the principal,¹⁸⁹ although, through the fault of the principal, the

¹⁸⁹ *Canada*: Lighthall v. Caffrey, 6 Leg. News, 202.

United States: Watson v. Brooks, 8 Sawy. 316, 13 Fed. Cas. 648; Gavock v. Woodlief, 20 How. 221.

California: Phelan v. Gardner, 43 Cal. 306; Dolan v. Scott, 44 Cal. 261; Blumenthal v. Goodall, 89 Cal. 251; Oullahan v. Oullahan, 100 Cal. 648.

Colorado: Buckingham v. Harris, 10 Colo. 455; Leech v. Leech, 14 Colo. App. 45; Walsh v. Hastings, 20 Colo. 243; Wright v. Wrentham, 16 Colo. 271, 25 Am. St. Rep. 265.

Illinois: Wilson v. Mason, 158 Ill. 304, 49 Am. St. Rep. 603; Pratt v. Hotchkiss, 10 Ill. App. 603; Schmidt v. Keeler, 63 Ill. App. 487; Jenkins v. Hollingsworth, 83 Ill. App. 139.

Indiana: McFarland v. Lillard, 2 Ind. App. 160, 50 Am. St. Rep. 234; Fischer v. Bell, 91 Ind. 243; Pape v. Wright, 116 Ind. 243.

Iowa: Hurd v. Neilson, 100 Iowa, 555; Smith v. Allen, 100 Iowa, 608; Cassady v. Seeley, 69 Iowa, 509; Burns v. Oliphant, 100 Iowa, 456; Bird v. Phillips, 115 Iowa, 703.

Kentucky: Coleman's Ex'r v. Meade, 13 Bush, 358.

Maine: Veazle v. Parker, 72 Me. 443.

Maryland: Jones v. Adler, 34 Md. 440; Livezy v. Miller, 336 Md. 336.

Massachusetts: Desmond v. Stebbins, 140 Mass. 339.

Michigan: Wright v. Beach, 82 Mich. 469; Fox v. Rouse, 82 Mich. 558.

Minnesota: Fairchild v. Cunningham, 84 Minn. 521; Rees, 34 Minn. 277; Hubachek v. Hazzard, 83 Minn. 437.

Missouri: Butts v. Ruby, 85 Mo. App. 405; Finley v. Finley, 85 Mo. App. 604; Gelatt v. Ridge, 117 Mo. 553, 38 Am. St. Rep. 638; Gaty v. Foster, 18 Mo. App. 639; Timberman v. Craddock, 117 Mo. 638.

Nebraska: Jones v. Stevens, 36 Neb. 849; Stewart v. Stewart, 36 Neb. 631.

New Hampshire: Parker v. Estabrook, 68 N. H. 349.

New Jersey: Hinds v. Henry, 36 N. J. Law, 328.

New York: Steinfeld v. Storm, 31 Misc. 167; McClave v. McClave, 31 Misc. 167.

not actually consummated;¹⁹⁰ or although the broker has not himself made a binding contract of sale with the pur-

49 N. Y. 561, 10 Am. Rep. 431; Duclos v. Cunningham, 102 N. Y. 878; Fraser v. Wyckoff, 63 N. Y. 445; Simpson v. Smith, 36 Misc. 815.

North Carolina: Mallonee v. Young, 119 N. C. 549.

Ohio: Roush v. Loeffler, 18 Ohio Circ. R. 806, 6 Ohio Circ. Dec. 760.

Pennsylvania: Clendenon v. Pancoast, 75 Pa. 213; Holmes v. Neafie, 151 Pa. 392; Pratt v. Patterson's Ex'rs, 112 Pa. 475.

Tennessee: Cheatham v. Yarbrough, 90 Tenn. 77; Woodall v. Foster, 91 Tenn. 195.

Texas: Gibson v. Gray, 17 Tex. Civ. App. 646; Pryor v. Jelly, 91 Tex. 86; Graves v. Bains, 78 Tex. 92; De Cordova v. Bahn, 74 Tex. 543.

Wisconsin: Barthell v. Peter, 88 Wis. 316, 43 Am. St. Rep. 906; Ames v. Lamont, 107 Wis. 531.

To entitle a broker, under a contract authorizing him to sell stocks and to receive as his commission all he could obtain above a designated price, to recover such commission when no sale is actually consummated, he must prove that he found a purchaser ready, willing, and able to buy the property on the terms fixed, and either that he procured from that person a valid contract binding him to make the purchase, or that he brought the vendor and the proposed purchaser together so that the vendor might have secured such contract had he so desired. Readiness and willingness to purchase can be shown only by an offer on the part of the purchaser to the vendor to enter into the contract of purchase, or by the execution on the part of the purchaser of a valid contract of purchase. Mattingly v. Pennie, 105 Cal. 514, 45 Am. St. Rep. 87. If the purchaser pays part of the purchase money, enters into possession, and is granted the privilege of selling any portion of the lands purchased, this constitutes a sufficient sale to create a liability in favor of the brokers, though the purchaser afterwards surrenders the contract and delivers up possession. Shainwald v. Cady, 92 Cal. 83.

¹⁹⁰ Kock v. Emmerling, 22 How. (U. S.) 69; Neilson v. Lee, 60 Cal. 555; Phelan v. Gardner, 43 Cal. 308; Spaulding v. Saltiel, 18 Colo. 86; Buckingham v. Harris, 10 Colo. 455; Cawker v. Apple, 15 Colo. 141; Finnerty v. Fritz, 5 Colo. 174; McEwen v. Kerfoot, 37 Ill. 530; Hecht v. Hall, 62 Ill. App. 100; Flood v. Leonard, 44 Ill. App. 113; McGuire v. Carlson, 61 Ill. App. 295; Fischer v. Bell, 91 Ind. 243; Love v. Miller, 53 Ind. 294, 21 Am. Rep. 192; Ford v. Easley, 88 Iowa, 603; Neiderlander v. Starr, 50 Kan. 770; Holden v. Starks, 159 Mass. 503; Reeves v. Vette, 62 Mo. App. 440; Harwood

chaser.¹⁹¹ No binding written contract of sale is required if the principal is in a situation to execute it himself. If no particular terms had been proposed, he has earned his commission, when he produces a purchaser whom the principal accepts or to whom he sells.¹⁹² There is no distinction between a broker to sell real estate and a broker to find purchasers therefor. In either case, he is required to find no more than find a suitable purchaser. He cannot sell unless specially authorized to do so by power of attorney. That must be done by the principal. The broker's taking to sell in such cases is no more than an engagement to find a purchaser who is ready and willing to

v. Diemer, 41 Mo. App. 48; *Jones v. Stevens*, 36 Neb. 849; *Wood v. Burton*, 27 Neb. 808; *Barnard v. Monnot*, 33 How. (N. Y.) 440; *Hart v. Hoffman*, 44 How. Pr. (N. Y.) 168; *McElder*, 56 N. Y. 238; *Heintz v. Boehmer*, 4 Ohio N. P. 226; *Henarie*, 13 Or. 156; *Edwards v. Goldsmith*, 16 Pa. 43; *Clark v. Yarbrough*, 90 Tenn. 77 (although it was stipulated that the commissions should be paid out of the purchase price); *Wood v. Foster*, 91 Tenn. 195; *Sullivan v. Hampton* (Tex. Civ. App. W. 235; *Brackenridge v. Claridge*, 91 Tex. 527; *Burnett v. 19 Tex. Civ. App. 711; Orynski v. Menger*, 15 Tex. Civ. App.

¹⁹¹ *Buckingham v. Harris*, 10 Colo. 455; *Desmond v. Stebbins*, Mass. 339; *McCreery v. Green*, 38 Mich. 185; *Fraser v. Wyckoff*, N. Y. 445; *Brackinridge v. Claridge*, 91 Tex. 527.

¹⁹² *Gelatt v. Ridge*, 117 Mo. 553, 38 Am. St. Rep. 683; *McGee*, 2 Mackey (D. C.) 17; *Duffy v. Hobson*, 40 Cal. 240, 6 Am. Rep. 617; *Rutenberg v. Main*, 47 Cal. 213; *Brackenridge v. 91 Tex. 527.*

¹⁹³ *Cassady v. Seeley*, 69 Iowa, 509; *Hanna v. Collins*, 69 Iowa, 509; *Iselin v. Griffith*, 62 Iowa, 668; *Lockwood v. Halsey*, 41 Kan. 358; *Coleman's Ex'r v. Meade*, 13 Bush (Ky.) 358; *Veazie v. Pa. Me. 443; Desmond v. Stebbins*, 140 Mass. 339; *Rice v. Mass. 550; Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378, 38 A. 441; *Glentworth v. Luther*, 21 Barb. (N. Y.) 147; *Sussman v. Schmidt*, 55 N. Y. 319; *Fisk v. Henarie*, 13 Or. 156; *Conrad v. Krakauer*, 70 Tex. 735; *Stewart v. Mather*, 32 Wis. 344. See also § 773.

¹⁹⁴ *McFarland v. Lillard*, 2 Ind. App. 160, 50 Am. St. Rep. 588; *Duffy v. Hobson*, 40 Cal. 240, 6 Am. Rep. 617; *Ryon v. Mackey* (D. C.) 17; *Goss v. Broom*, 31 Minn. 484; *Reynolds v. Tompkins*, 23 W. Va. 229. See, also, *Lockwood v. Rose*, 100 N. Y. 588.

His right to commissions does not depend upon whether the power conferred on him is to sell or merely to secure a buyer, if he has complied with his part of the contract in procuring the purchaser.¹⁹⁵ And though he has agreed to accept his commission in proportionate amounts, from time to time, as the deferred purchase money is paid, if default is made in payment of such purchase money and foreclosure had, he becomes at once entitled to commission upon the amount realized on the foreclosure sale, not in excess of the balance due him.¹⁹⁶ But if he does not procure a purchaser, his negotiating for a sale will not entitle him to commissions,¹⁹⁷ nor can he recover on a quantum meruit for services rendered.¹⁹⁸ So a contract by a broker to find a purchaser is not performed, so as to entitle him to commissions, where he procured one who merely obtained an option on the land, and made no offer to purchase.¹⁹⁹

This general rule rests upon the general usage of the business and may be modified by a special usage or by a special agreement between the parties.²⁰⁰ Thus a broker may so contract with his principal as to make his compensation dependent upon a contingency which his own efforts cannot control, even though such contingency relates to the acts of his principal.²⁰¹

¹⁹⁵ *Fiske v. Soule*, 87 Cal. 313; *Stephens v. Scott*, 43 Kan. 285.

¹⁹⁶ *Crane v. Eddy*, 191 Ill. 645, 85 Am. St. Rep. 284.

¹⁹⁷ *Sloman v. Bodwell*, 24 Neb. 790; *Montgomery v. Knickerbacker*, 27 App. Div. (N. Y.) 117; *Cadigan v. Crabtree*, 179 Mass. 474, 88 Am. St. Rep. 397.

¹⁹⁸ *Cadigan v. Crabtree*, 179 Mass. 474, 88 Am. St. Rep. 397.

¹⁹⁹ *Block v. Walker*, 72 Fed. 650; *Pape v. Romy*, 16 Ind. App. 470; *Aigler v. Carpenter Place Land Co.*, 51 Kan. 718; *Butts v. Ruby*, 85 Mo. App. 405; *Levy v. Kottman*, 11 Misc. (N. Y.) 372; *Brackenridge v. Claridge*, 91 Tex. 527; *Dwyer v. Raborn*, 6 Wash. 213; *Arthur D. Jones & Co. v. Ellenfeldt*, 28 Wash. 687.

²⁰⁰ *Hinds v. Henry*, 36 N. J. Law, 328; *Read v. Rann*, 10 Barn. & C. 438; *Broad v. Thomas*, 7 Bing. 99.

²⁰¹ *Bull v. Price*, 7 Bing. 238; *Hammond v. Crawford*, 35 U. S. App. 1; *McPhail v. Buell*, 87 Cal. 115; *Rand v. Conkrite*, 64 Ill. App. 208; *Robinson v. Kindley*, 36 Kan. 157; *Walker v. Tirrell*, 101 Mass. 257, 3 Am. Rep. 352; *Flower v. Davidson*, 44 Minn. 46; *Hinds v. Henry*, 36 N. J. Law, 328; *Platt v. Kohler*, 65 Hun (N. Y.) 557; *Halprin v. Schachne*, 25 Misc. (N. Y.) 797; *White v. Molloy*, 9

It has been held in some cases, however, that the binding of parties together includes the idea of their being bound to each other by a valid contract, and an agreement to employ a broker to procure a purchaser not only implies that the purchaser shall be able to comply, but that the seller and the purchaser must be bound to each other in a valid contract. And some of the cases go so far as to hold that the broker must produce a person who ultimately becomes a purchaser before he is entitled to his commissions. It is not sufficient that he should enter into an agreement to purchase, but he must actually purchase, by complying with the terms of the agreement upon, unless his failure to do so is occasioned by the fault of the vendor.²⁰² Thus, a broker has been held not

App. Div. (N. Y.) 101; *Cobb v. Kenner* (Tenn. Ch. App.) 277.

²⁰² *Wilson v. Mason*, 158 Ill. 304, 49 Am. St. Rep. 164; *Jones v. Hollingsworth*, 83 Ill. App. 139; *Friestedt v. Dietrich*, 84 Ill. 604; *Webber v. Holmes*, 174 Mass. 410; *Cook v. Fiske*, 174 Mass. (Mass.) 491; *Tombs v. Alexander*, 101 Mass. 255, 3 Am. Rep. 1; *Carnes v. Howard*, 180 Mass. 569; *Lunney v. Healey*, 56 N. H. 44 L. R. A. 593; *Parker v. Estabrook*, 68 N. H. 349. A broker authorized to sell property, and who informs his principal that there is a party willing to purchase on the terms upon which the principal had authorized the sale to be made, but without actually purchasing, who is the proposed purchaser, cannot recover his commission, although the principal refused to make the sale, if the principal had never entered into any valid and enforceable contract of purchase, and never made any offer to the principal to do so. The fact that the principal does not entitle the broker to the benefit of the commission would have accrued to him upon performance, if he had not so far performed his contract as to obtain a valid contract of purchase. *Mattingly v. Pennie*, 105 Cal. 514, 45 Am. St. Rep. 1.

²⁰³ *Hale v. Kumler*, 85 Fed. 161; *Quitow v. Perrin*, 120 Cal. 1; *Lindley v. Fay*, 119 Cal. 239 (where the broker's commission was to be paid "out of the first money received"); *Ford v. Brown*, 101 Cal. 551; *Hyams v. Miller*, 71 Ga. 608; *Boyd v. Watson*, 101 Ga. 214; *Hurd v. Neilson*, 100 Iowa, 555; *Stewart v. Fowler*, 101 Iowa, 677; *Stratton v. Jones*, 20 Ky. L. R. 1787, 50 S. W. 33; *De Smet v. Taney*, 13 La. Ann. 151; *Kimberly v. Henderson*, 29 Md. 51; *Ward v. Jackson*, 31 Md. 250, 1 Am. Rep. 49; *Campbell v. Vane*, 73 Mo. App. 84; *Walsh v. Gay*, 49 App. Div. (N. Y.) 50; *Loeffler*, 18 Ohio Circ. R. 806, 6 Ohio Circ. Dec. 760; *Pryor v. Ward*, 91 Tex. 86. And see *Ward v. Zborowski*, 31 Misc. (N. Y.) 60.

no commissions for procuring a purchaser of land, where his principal and the proposed purchaser failed to consummate a sale because of a dispute over taxes.²⁰⁴ So it has been held that a broker authorized to sell land for a commission does not effect a sale, so as to be entitled to such commission, by procuring a purchaser who enters into a contract by which he agrees to buy the land, or to forfeit the earnest money as damages for nonperformance of the contract.²⁰⁵

But "in all cases, under all and varying forms of expression, the fundamental and correct doctrine is that the duty assumed by the broker is to bring the minds of the buyer and seller to an agreement for a sale, and the price and terms on which it is to be made, and until that is done his right to commissions does not accrue."²⁰⁶

§ 772. Necessity of contract in writing.

If the broker is specially employed to negotiate, for his principal, the purchase, sale, or exchange of real estate, at a fixed sum, his services will not be complete until a valid written contract binding on both vendor and purchaser has been entered into to purchase, sell, or exchange on the terms specified, unless this condition is waived by the principal; but until such contract has been made or waived, the broker has not earned his commissions.²⁰⁷ Or if it is agreed be-

v. Ryan, 4 App. D. C. 283; *Wilson v. Mason*, 158 Ill. 304, 49 Am. St. Rep. 164; *Dorrington v. Powell*, 52 Neb. 440. But see *Thain v. Philbrick*, 36 Misc. (N. Y.) 829.

²⁰⁴ *Guthmann v. Meuer*, 31 Misc. (N. Y.) 810.

²⁰⁵ *Lawrence v. Rhodes*, 188 Ill. 96.

²⁰⁶ *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378, 38 Am. Rep. 444, citing *McGavock v. Woodlief*, 20 How. (U. S.) 221; *Barnes v. Roberts*, 5 Bosw. (N. Y.) 73; *Holly v. Gosling*, 3 E. D. Smith (N. Y.) 262; *Kock v. Emmerling*, 22 How. (U. S.) 72; *Corning v. Calvert*, 2 Hilt. (N. Y.) 56.

²⁰⁷ *Hale v. Kumler*, 85 Fed. 161; *Ford v. Brown*, 120 Cal. 551; *Leete v. Norton*, 43 Conn. 219; *Hyams v. Miller*, 71 Ga. 608; *Odell v. Dozier*, 104 Ga. 203 (although the contract may be afterwards modified or a new one made); *Kerfoot v. Steele*, 113 Ill. 610; *Wilson v. Mason*, 158 Ill. 304, 49 Am. St. Rep. 162; *Micks v. Stevenson*, 22 Ind. App. 475; *Love v. Miller*, 53 Ind. 294, 21 Am. Rep. 192; *Tombs v. Alexander*, 101 Mass. 255, 3 Am. Rep. 349; *Cook v. Fiske*, 12 Gray

tween the broker and the owner that such contract shall be in writing, then no commission can be collected if such written contract to purchase is furnished.²⁰⁸ The broker will not be entitled to such commissions if he effects a verbal agreement for sale, which is repudiated by the proposed purchaser before its reduction to writing, then there is no fault upon the part of the owner of the realty.²⁰⁹ If a contract is of such a character that the vendee successfully pleads the statute of frauds against its performance, it is not a valid contract entitling the broker to commissions.²¹⁰

(Mass.) 491; *Pearson v. Mason*, 120 Mass. 53; *Carnes v. Ho* Mass. 569; *Lunney v. Healey*, 56 Neb. 313, 44 L. R. A. 593; *v. Clark*, 86 Tenn. 583; *Parker v. Walker*, 86 Tenn. 566.

A sale is effected, so as to entitle a real estate broker to commissions, within the meaning of a contract by which the broker agreed to pay him a commission if he should effect a sale of real estate, where such contract was made after the terms between the vendor and vendee, brought together by him, were settled, and subsequently the parties signed an agreement to buy within a certain time, on condition that a certain release be procured, though afterwards, solely because of the failure of the vendee to pay as agreed, the vendor notified him that "the matter was at an end," and retained the money already paid by the vendee as a forfeit. *Ward v. Cobb*, 148 Mass. 518, 12 Am. St. Rep. 100.

Where the defendant sent a proposal to a broker in these terms: "If you send or cause to be sent to me, by advertisement or otherwise, any party with whom I may see fit and proper to effect the purchase or exchange of my real estate, above described, I will pay him a sum of \$200," and the broker found a person who proposed to purchase the property, but the sale was not effected, it was held that the broker was not entitled to compensation. *Walker v. Tilton*, 111 Mass. 257, 3 Am. Rep. 352. So under an agreement by which the principal is to pay the brokers a stipulated commission on the event they bring about a sale of the principal's land on terms satisfactory to him, the brokers are not entitled to the commission merely calling the purchaser's attention to the fact that the land was for sale. *Green v. Owings*, 19 Ky. L. R. 580, 41 S. W. 264.

²⁰⁸ *McFarland v. Lillard*, 2 Ind. App. 160, 50 Am. St. Rep. 100; *Fischer v. Bell*, 91 Ind. 243.

²⁰⁹ *Gilchrist v. Clark*, 86 Tenn. 583; *Parker v. Walker*, 86 Tenn. 566; *Christensen v. Wooley*, 41 Mo. App. 53.

²¹⁰ *Wilson v. Mason*, 158 Ill. 304, 49 Am. St. Rep. 162.

773. Acceptance or ratification by the principal.

But where the broker presents to his principal a proposed purchaser, and the principal accepts such purchaser, either on the terms previously proposed or upon terms then agreed upon, and enters into an enforceable contract with him, without any fraud, concealment, or other improper practice on the part of the broker, the latter's undertaking will have been completed and his commissions fully earned;²¹¹ although it turns out that the customer is unable or refuses to comply with his contract, and for that reason the transaction is not consummated.²¹² The ground on which this is settled is that, by entering into a valid contract with the

²¹¹ *Coward v. Clanton*, 122 Cal. 451; *Smith v. Schiele*, 93 Cal. 144; *Howles v. Harvey*, 10 Colo. App. 9; *Lincoln v. McClatchie*, 36 Conn. 65; *Wilson v. Mason*, 158 Ill. 304, 49 Am. St. Rep. 162; *Lapsley v. Burdige*, 71 Ill. App. 652; *Jenkins v. Hollingsworth*, 83 Ill. App. 19; *Springer v. Orr*, 82 Ill. App. 558; *McFarland v. Lillard*, 2 Ind. App. 160, 50 Am. St. Rep. 234; *Ratts v. Shepherd*, 37 Kan. 20; *Lockwood v. Halsey*, 41 Kan. 166; *Plant v. Thompson*, 42 Kan. 664, 16 Am. St. Rep. 512; *Coleman's Ex'r v. Meade*, 13 Bush (Ky.) 358; *Roche v. Smith*, 176 Mass. 595, 79 Am. St. Rep. 345; *Brooks v. Mathers*, 111 Mich. 463; *Hannan v. Fisher*, 82 Mich. 208; *Hitchcock v. Griffin*, 99 Mich. 447, 41 Am. St. Rep. 624; *Francis v. Baker*, 45 Minn. 83; *Gelatt v. Ridge*, 117 Mo. 553, 38 Am. St. Rep. 683; *Henderson v. Mace*, 64 Mo. App. 393; *Brundage v. McCormick*, 69 Hun (N. Y.) 65; *O'Toole v. Tucker*, 17 Misc. (N. Y.) 554; *Lyle v. Bennett*, 17 Misc. (N. Y.) 476; *Miller v. Barth*, 35 Misc. (N. Y.) 372; *Dayton American Steel Barge Co.*, 36 Misc. (N. Y.) 223; *Burchfield v. Griffith*, 10 Pa. Super. Ct. 618; *Keys v. Johnson*, 68 Pa. 42; *Hunter v. Arent* (S. D.) 93 N. W. 653; *Pryor v. Jolly* (Tex. Civ. App.) 24 S. W. 1019; *Thornton v. Moody* (Tex. Civ. App.) 24 S. W. 331; *Hair v. Slosson*, 27 Tex. Civ. App. 403. A deed executed by the principal after suit is instituted is admissible to show a ratification of the broker's contract. *Gelatt v. Ridge*, 117 Mo. 553, 38 Am. St. Rep. 683. See, also, *Cannon v. Castleman*, 24 Ind. App. 188.

²¹² *Wray v. Carpenter*, 16 Colo. 271, 25 Am. St. Rep. 265; *Jenkins v. Hollingsworth*, 83 Ill. App. 139; *Friedstedt v. Dietrich*, 84 Ill. App. 1; *Off v. J. B. Inderrieden Co.*, 74 Ill. App. 105; *Webber v. Holmes*, 101 Mass. 410; *Roche v. Smith*, 176 Mass. 595, 79 Am. St. Rep. 345; *Hard v. Cobb*, 148 Mass. 518, 12 Am. St. Rep. 587; *Lunney v. Daley*, 56 Neb. 313; *Parker v. Estabrook*, 68 N. H. 349; *Kelley v. Ker*, 132 N. Y. 1, 28 Am. St. Rep. 542; *Travis v. Graham*, 23 App. Div. (N. Y.) 214; *Hipple v. Laird*, 189 Pa. 472.

C. & S.—105.

customer produced by the broker, the principal ac-
customer as able, ready, and willing to complete
tract.²¹³ Thus, though a contract of sale made
estate broker varies from the terms of his author-
upon approval and ratification by the principal, it
a part of the original contract, and the broker is en-
his commissions as fixed therein.²¹⁴ Yet if the
in accepting him as the purchaser did not rely on
judgment, but rather upon that of the broker, and
chaser is not able to comply with his contract, the
would not be entitled to commissions;²¹⁵ nor would
titled to commissions if the ratification was made
strength of false statements made by him.²¹⁶

The same rule applies when the principal
buy instead of sell, or when the broker is em-
get for his principal a certain piece of land.²¹⁷
a broker employed to procure a person to convey land
principal, by way of sale or exchange, in good faith
duces a customer as a person ready, able, and will-
so, the principal has three courses of action open:
(1) He may examine the title of the customer, and
him or not accept him on learning the result of the ex-
tation. (2) He may enter into a contract with him,
it is provided that his title shall be examined, and
turns out that his title is not good the contract is void.
(3) He may enter into a binding contract with him
conveyance of the land. In case he takes the third
of action he is given full compensation in damages.

²¹³ *Roche v. Smith*, 176 Mass. 595, 79 Am. St. Rep. 347.

²¹⁴ *Gelatt v. Rldge*, 117 Mo. 553, 38 Am. St. Rep. 683;
Schiele, 93 Cal. 144; *Coward v. Clanton*, 122 Cal. 451;
Hollingshead, 40 Ill. App. 195; *McFarland v. Lillard*, 2
160, 50 Am. St. Rep. 234; *Nesbitt v. Helser*, 49 Mo. 383;
sen v. Wooley, 41 Mo. App. 53; *Gilder v. Davis*, 137
Blair v. Slosson, 27 Tex. Civ. App. 403; *Edward H. Eve*
Cumberland Glass Mfg. Co., 112 Wis. 544; *Willes v.*
Wis. 81.

²¹⁵ *Butler v. Baker*, 17 R. I. 582, 33 Am. St. Rep. 897;
Jetter, 18 Misc. (N. Y.) 368.

²¹⁶ *Courtney v. Continental Land & Cattle Co.*, 17 Mon.

²¹⁷ *Roche v. Smith*, 176 Mass. 595, 79 Am. St. Rep. 345.

loss of his bargain, if the customer fails to fulfill his contract by conveying the land. Since the principal gets full compensation for the loss of his bargain in that event, there is no escape from holding that the broker has earned his commission when his efforts have resulted in the making of a valid contract. It does not lie in the mouth of a principal to say that the broker's commission has not been earned, when he has secured through the broker's efforts the land he wished, or full compensation for the loss of it. He cannot retain the right to this compensation and not pay for the broker's services in obtaining it for him."²¹⁸

§ 774. Broker need not negotiate the sale.

As has been suggested heretofore, it is not necessary that the broker should negotiate the sale or exchange, in order to entitle him to his commissions, if it appears that he introduced the parties, and such introduction led up to the contract, or in other words that he was the procuring cause of the sale;²¹⁹ nor is it necessary that he should be present when the negotiations were completed;²²⁰ nor that the vendor should have known, at the time, that the purchaser had been found by the broker.²²¹

²¹⁸ *Roche v. Smith*, 176 Mass. 595, 79 Am. St. Rep. 345, 348.

²¹⁹ *Scott v. Patterson*, 53 Ark. 49; *Barnett v. Gluting*, 3 Ind. App. 15; *Veazie v. Parker*, 72 Me. 443; *Attrill v. Patterson*, 58 Md. 226; *Rice v. Mayo*, 107 Mass. 550; *Fox v. Rouse*, 47 Mich. 558; *Timberman v. Craddock*, 70 Mo. 638; *Redfield v. Tegg*, 38 N. Y. 217; *Sussdorff v. Schmidt*, 55 N. Y. 319; *Wyckoff v. Bliss*, 12 Daly (N. Y.) 24; *Lloyd v. Matthews*, 51 N. Y. 132; *Lyon v. Mitchell*, 36 N. Y. 237, 3 Am. Dec. 502; *Royster v. Mageveney*, 9 Lea (Tenn.) 148; *Bracknridge v. Claridge*, 91 Tex. 527; *McKenzie v. Lego*, 98 Wis. 364. And see post, § 776.

²²⁰ *Sibbald v. Bethlehem Iron Works*, 83 N. Y. 378, 38 Am. Rep. 41; *Royster v. Mageveney*, 9 Lea (Tenn.) 148; *Dreisback v. Rolins*, 39 Kan. 268; *Timberman v. Craddock*, 70 Mo. 638; *Roush v. Coeffier*, 18 Ohio Circ. R. 806, 6 Ohio Circ. Dec. 760; *McGavock v. Woodlief*, 20 How. (U. S.) 221.

²²¹ *Goffe v. Gibson*, 18 Mo. App. 1; *Wylie v. Marine Nat. Bank*, 61 N. Y. 415; *Sussdorff v. Schmidt*, 55 N. Y. 320; *Craig v. Wead*, 58 Neb. 782; *Boyd v. Watson*, 101 Iowa, 214; *Hambleton v. Fort*, 58 Neb. 282; *Rounds v. Alee*, 116 Iowa, 345.

§ 775. Responsibility and readiness of proposed purchaser.

So in order for the broker to be able to recover his commissions for producing a purchaser, where the sale is completed, it is incumbent on him to show that the person presented by him was one of sufficient financial ability to cause it is part of his undertaking to produce such a person.²²² The production by the broker of a person who is able financially as well as ready and willing, to purchase, is an implied representation on his part that such a purchaser is able financially as well as ready and willing, to purchase.²²³ And if the broker shows that he has produced a purchaser who was ready to take and pay for the property and the owner refuses to convey, the broker may maintain an action against him for breach of contract, where he has agreed in writing to convey it to the intending purchaser from whom the broker was to receive his commission. There are other cases, however, which hold that the burden of proof is on the principal to show that the person produced is not responsible, on the ground that it is to be presumed until the contrary appears, that the person procured by the broker is solvent and pecuniarily able to make the purchase.²²⁵ But if the owner repudiates the sale on some

²²² *McGavock v. Woodlief*, 20 How. (U. S.) 221; *Cook v. ...*, 116 Ala. 395; *Jenkins v. Hollingsworth*, 83 Ill. App. 139; *Hotchkiss*, 10 Ill. App. 603; *Leahy v. Hair*, 33 Ill. App. 461; *... v. Griffith*, 62 Iowa, 668; *Betz v. Williams & W. Land & L...*, 46 Kan. 45; *Coleman's Ex'r v. Meade*, 13 Bush (Ky.) 358; *... v. Walker*, 41 Mo. App. 118; *Mullenhoff v. Gensler*, 15 N. Y. 673; *Folsom v. Hesse*, 24 Misc. (N. Y.) 713; *Butler v. B...*, R. I. 582, 33 Am. St. Rep. 897. After the execution of a contract of sale, the vendor's liability for commissions is not affected by the financial inability of the purchaser to perform a contract. *Wright v. Brown*, 68 Mo. App. 577.

²²³ *Butler v. Baker*, 17 R. I. 582, 33 Am. St. Rep. 897.

²²⁴ *Atkinson v. Pack*, 114 N. C. 597.

²²⁵ *Grosse v. Cooley*, 43 Minn. 188; *Goss v. Broom*, 31 Minn. 188; *Parker v. Estabrook*, 68 N. H. 349; *Hart v. Hoffman*, 44 N. Y. 168; *Simonson v. Kissick*, 4 Daly (N. Y.) 143; *Kroemeke*, 4 Daly (N. Y.) 268; *Fairly v. Wappoo Mills*, 4 Daly 227 (where the principal has accepted the purchaser); *St. ... v. Montpelier Carriage Co.*, 37 Fed. 760 (holding that where the principal has accepted the purchaser, he has no right to question the purchaser's responsibility has not been

ground than the purchaser's financial inability to complete the purchase, he cannot on that ground defeat the broker's action for commissions, unless that ground is made an element of the contract between the broker and the owner.²²⁶

It is also incumbent on the broker, in order to recover his commissions, to show that the purchaser produced by him was ready and willing to complete the sale or exchange on the terms proposed by the principal;²²⁷ and unless he is so proven, the seller is not bound to accept him or to pay the commissions.²²⁸ And if he produces a customer on terms different from those proposed by his principal, he is not entitled to his commissions, though a contract is subsequently made with such customer through another broker on terms substantially the same as those proposed by the principal to him.²²⁹ The principal may, however, waive any variance

served by the principal, the broker may recover his commissions without showing such responsibility).

²²⁶ *McFarland v. Lillard*, 2 Ind. App. 160, 50 Am. St. Rep. 234.

²²⁷ *McGavock v. Woodlief*, 20 How. (U. S.) 221; *Sullivan v. Milliken*, 113 Fed. 93; *Waterman v. Boltinghouse*, 82 Cal. 659; *Wilson v. Mason*, 158 Ill. 304, 49 Am. St. Rep. 163; *Schmidt v. Keeler*, 63 Ill. App. 487; *Ward v. Lawrence*, 79 Ill. 295; *Hoyt v. Shipherd*, 70 Ill. 309; *Rees v. Spruance*, 45 Ill. 308; *Platt v. Jahr*, 9 Ind. App. 58; *Dent v. Powell*, 93 Iowa, 711; *Aigler v. Carpenter Place Land Co.*, 51 Kan. 718; *Kimberly v. Henderson*, 29 Md. 512; *Schwartz v. Yearly*, 31 Md. 270; *Chapin v. Bridges*, 116 Mass. 105; *Cadigan v. Crabtree*, 179 Mass. 474, 88 Am. St. Rep. 397; *Williams v. McGraw*, 52 Mich. 480; *Hamlin v. Schulte*, 31 Minn. 486; *Bradford v. Menard*, 35 Minn. 197; *Hayden v. Grillo*, 26 Mo. App. 289; *Childs v. Ptomey*, 17 Mont. 502; *Parker v. Estabrook*, 68 N. H. 349; *Wylie v. Marine Nat. Bank*, 61 N. Y. 415; *Fraser v. Wyckoff*, 63 N. Y. 445; *Smith v. Seattle, L. S. & E. R. Co.*, 72 Hun (N. Y.) 202; *Muskowitz v. Hornberger*, 20 Misc. (N. Y.) 558; *Folsom v. Hesse*, 24 Misc. (N. Y.) 713; *Kirwan v. Barney*, 27 Misc. (N. Y.) 181; *Booth v. Moody*, 30 Or. 222; *Clendenon v. Pancoast*, 75 Pa. 213; *Tousey v. Etzel*, 9 Utah, 329. Compare *Springer v. Orr*, 82 Ill. App. 558.

²²⁸ *Tombs v. Alexander*, 101 Mass. 255, 3 Am. Rep. 349; *Pratt v. Hotchkiss*, 10 Ill. App. 603; *Hamlin v. Schulte*, 31 Minn. 486; *Yoder v. White*, 75 Mo. App. 155; *Fraser v. Wyckoff*, 63 N. Y. 445; *Wylie v. Marine Nat. Bank*, 61 N. Y. 415; *Moses v. Bierling*, 31 N. Y. 462.

²²⁹ *Cadigan v. Crabtree*, 179 Mass. 474, 88 Am. St. Rep. 397.

that may arise between the terms or conditions proposed by him and those proposed by the seller.²³⁰

§ 776. Broker must be the procuring cause—Perform the principal or another.

In short it may be stated as a general rule that it is essential to the broker's right to commissions that he should be the procuring cause of the sale, or other business transacted through his agency. It is necessary that his efforts, however slight, should have been the means by which the sale is effected or the other business transacted.

²³⁰ *McArthur v. Slauson*, 53 Wis. 41; *Stewart v. Mather*, 344.

²³¹ *Green v. Bartlett*, 14 C. B. (N. S.) 681; *Mansell v. C. L. R.* 9 C. P. 139; *Starr, Son & Co. v. Royal Elec. Co.*, Scotia, 156; *Anderson v. Smythe*, 1 Colo. App. 253; *D. Borden*, 13 Colo. App. 481 (and the law favors that construction of the contract, and that interpretation of the facts and actions of the parties, which will best secure to the broker payment of commissions); *Lincoln v. McClatchie*, 36 Conn. 136; *Doonan v. Ga.* 295; *Pope v. Beals*, 108 Mass. 561; *Cadigan v. Crab*, Mass. 474; *Crowley v. Somerville*, 70 Mo. App. 376; *She Hedden*, 29 N. J. Law, 334; *Wylie v. Marine Nat. Bank*, 415; *Burchfield v. Griffith*, 10 Pa. Super. Ct. 618.

In *Earp v. Cummins*, 54 Pa. 394, 93 Am. Dec. 719, W. C. J., says: "His service, as broker, however slight, must be the efficient cause of the sale. If a mere introduction of the property to the notice of the buyer effects the sale, the broker earns his commission. An advertisement or any other service is enough to make the immediate and efficient cause of the bargain. But if the efforts of the broker, whatever they be, fail to accomplish a sale, and several months after the proposed purchaser has decided not to buy, he is induced by other persons to reconsider his resolution, and makes his purchase as the consequence of such secondary intervening influence, the broker has no right to a commission. In a certain sense it may be true that the purchase was in consequence of the broker's advertisement; but for that, the purchaser must have looked at the property, nor entertained a thought of buying it, but the evidence in this case shows that it was at least due to some other so distinct and separate a cause that it was a mistake to impute the sale to the broker to recover. The simple answer to his demand is that if the evidence was believed, he did not cause the sale, and his agency was not the immediate and efficient cause of it, and law regards only proximate and not remote, causes."

if the contract was entered into without his intervention, however great his exertions in the matter may have been, he cannot recover for his services.²³² And the fact that the owner of property has employed a broker to sell it for him does not deprive the owner of the right, unless he has waived it, to sell the property himself at any time before the broker has acted upon the offer and secured a purchaser; and if the owner does in good faith so sell without any agency of the broker, he will not be liable to the latter for commissions, though the sale is made to one to whom the broker endeavored to sell;²³³ unless it is expressly agreed that the broker should receive a commission for his services, whether the sale

²³² *Curtis v. Nixon*, 24 Law T. (N. S.) 706; *Rees v. Pellow*, 97 Fed. 167; *Zeimer v. Antisell*, 75 Cal. 509; *Doonan v. Ives*, 73 Ga. 295; *Neufeld v. Oren*, 60 Ill. App. 350; *Sievers v. Griffin*, 14 Ill. App. 3; *Platt v. Johr*, 9 Ind. App. 58; *Latschaw v. Moore*, 53 Kan. 234; *Combs v. Alexander*, 101 Mass. 255, 3 Am. Rep. 349; *Houghton v. Milford Pink Granite Co.*, 171 Mass. 354; *Crowninshield v. Foster*, 69 Mass. 237; *Cadigan v. Crabtree*, 179 Mass. 474, 88 Am. St. Rep. 97; *Crowley v. Somerville*, 70 Mo. App. 376; *Warren v. Cram*, 71 Mo. App. 638; *Kelly v. Brennan*, 55 N. J. Eq. 423; *Wylie v. Marine Nat. Bank*, 61 N. Y. 415; *Markus v. Kenneally*, 19 Misc. (N. Y.) 17; *Colwell v. Tompkins*, 158 N. Y. 690; *Smith v. Seattle, L. S. & E. R. Co.*, 72 Hun (N. Y.) 202; *Moses v. Bierling*, 31 N. Y. 462; *Carp v. Cummins*, 54 Pa. 394, 93 Am. Dec. 718; *Brown v. Shelton* (Tex. Civ. App.) 23 S. W. 483; *Ames v. Lamont*, 107 Wis. 531.

²³³ *Starr, Son & Co. v. Royal Elec. Co.*, 33 Nova Scotia, 156; *Rees v. Pellow*, 97 Fed. 167; *Cook v. Forst*, 116 Ala. 395; *Hill v. Jebb*, 5 Ark. 574; *Dolan v. Scanlan*, 57 Cal. 261; *Anderson v. Smythe*, 1 Colo. App. 253; *Hungerford v. Hicks*, 39 Conn. 259; *Bryan v. Albert*, 3 App. D. C. 180; *Doonan v. Ives*, 73 Ga. 295; *Gilbert v. Coons*, 37 Ill. App. 448; *Stewart v. Murray*, 92 Ind. 543, 47 Am. Rep. 167; *Stedman v. Richardson*, 100 Ky. 79; *Collier v. Johnson*, 3 Ky. L. R. 2453, 67 S. W. 830; *Dole v. Sherwood*, 41 Minn. 535, 6 Am. St. Rep. 731; *Cathcart v. Bacon*, 47 Minn. 34; *Cullen v. Bell*, 43 Minn. 226; *Baars v. Hyland*, 65 Minn. 150; *Fairchild v. Cunningham*, 84 Minn. 521; *Kelly v. Brennan*, 55 N. J. Eq. 423; *McClave v. Paine*, 49 N. Y. 561, 10 Am. Rep. 431; *Wylie v. Marine Nat. Bank*, 61 N. Y. 415; *Chilton v. Butler*, 1 E. D. Smith (N. Y.) 50; *Walton v. Mc Morrow*, 39 App. Div. (N. Y.) 667; *Tyng v. Con- table*, 35 Misc. (N. Y.) 283 (lease of property); *Mallonee v. Young*, 19 N. C. 549; *Darrow v. Harlow*, 21 Wis. 302, 94 Am. Dec. 541; *Ames v. Lamont*, 107 Wis. 531.

should be made by the broker or by the principal, and performed services under such agreement.²³⁴ But if the broker has accepted the offer and his efforts have been in negotiations for a sale, and are in fact the proximate cause of the sale, which follows, the principal cannot in and escape liability to the broker by completing the sale himself, or through another.²³⁵ Thus, his commission is earned by finding a suitable purchaser, ready and willing to enter into a valid contract for the purchase upon the terms fixed by the owner, and having introduced such a purchaser.

²³⁴ *Kimmell v. Skelly*, 130 Cal. 555; *Gregory v. Bonney*, 100 Cal. 589; *Lapham v. Flint*, 86 Minn. 376.

²³⁵ *Holland v. Howard*, 105 Ala. 538; *Howe v. Werner*, 100 Ala. 530; *Hoadley v. Savings Bank of Danbury*, 71 Conn. 599; *Bryan v. Abert*, 3 App. D. C. 180; *Hoadley v. Savings Bank of Danbury*, 71 Conn. 599 (and the fact that the broker did not complete the exclusive sale of the property does not prevent his recovery); *McClatchie*, 36 Conn. 136; *Gresham v. Connally*, 100 Cal. 906; *Schuster v. Martin*, 45 Ill. App. 481; *Gleason v. Martin*, 100 Ill. App. 464; *Pate v. Marsh*, 65 Ill. App. 482; *Platt v. Johnson*, 100 Ill. App. 58; *Lane v. Albright*, 49 Ind. 275; *Ford v. Easley*, 88 Iowa, 360; *Gillett v. Corum*, 7 Kan. 100; *Thompson v. Thompson*, 42 Kan. 664, 16 Am. St. Rep. 512; *Ratts v. Thompson*, 37 Kan. 20; *Dreisbach v. Rollins*, 39 Kan. 268; *Leviston v. Dreiaux*, 6 La. Ann. 26; *Gottschalk v. Jennings*, 1 La. Ann. 70; *Taylor v. Martin*, 109 La. 137; *Veazie v. Martin*, 109 Me. 443; *Schwartz v. Yearly*, 31 Md. 270; *Newhall v. E. E. Mass.*, 457; *Loud v. Hall*, 106 Mass. 404; *Rogers v. Evangelist Benev. & Missionary Soc.*, 168 Mass. 592; *Wood v. Michigan*, 320; *Dole v. Sherwood*, 41 Minn. 535, 16 Am. St. Rep. 11; *Hubachek v. Hazzard*, 83 Minn. 437; *Gelatt v. Ridge*, 111 Mo. 38, 38 Am. St. Rep. 683; *Bell v. Kaiser*, 50 Mo. 150; *Tyler v. Missouri*, 249; *Timberman v. Craddock*, 70 Mo. 638; *Nicholas v. Nebraska*, 23 Neb. 813; *Butler v. Kennard*, 23 Neb. 357; *Potvin v. Nebraska*, 302; *Anderson v. Cox*, 16 Neb. 10; *Hambleton v. Ford*, 282; *Shepherd v. Hedden*, 29 N. J. Law, 334; *Sibbald v. Iron Co.*, 83 N. Y. 378, 38 Am. Rep. 441; *Sussdorff v. S. N. Y.*, 320; *Wyckoff v. Bliss*, 12 Daly (N. Y.) 324; *Doran v. 18 App. Div. (N. Y.)* 36; *Keys v. Johnson*, 68 Pa. 42; *Chambers*, 121 Pa. 84; *Reed's Ex'rs v. Reed*, 82 Pa. 420; *v. Cary*, 5 Baxt. (Tenn.) 609; *Royster v. Mageveney*, 9 Le. 148; *Woodall v. Foster*, 91 Tenn. 195; *Knox v. Parker*, 81 St. 34; *Terry v. Reynolds*, 111 Wis. 122.

owner as a purchaser, he is not deprived of his right to commissions by the owner negotiating the contract himself or through another;²³⁶ and if the vendor in completing the sale sells for a greater or less sum than he had authorized the broker to sell for, the latter would, nevertheless, be entitled to his commissions on the amount realized.²³⁷ So where, by contract, commissions are to be paid to a broker on the sale or exchange of real estate, the principal is not released from payment of commissions by a change in the ownership of the property, described in the contract, during the nego-

²³⁶ *Cook v. Forst*, 116 Ala. 395; *Scott v. Patterson*, 53 Ark. 49; *Dolan v. Scanlan*, 57 Cal. 261; *Zelmer v. Antisell*, 75 Cal. 509; *Hoadley v. Savings Bank of Danbury*, 71 Conn. 599; *Lincoln v. McClatchie*, 36 Conn. 136; *Gresham v. Connally*, 114 Ga. 906; *Snyder v. Fearer*, 87 Ill. App. 275; *Henry v. Stewart*, 185 Ill. 448; *Pate v. Marsh*, 65 Ill. App. 482; *Jenks v. Nobles*, 42 Ill. App. 33; *Clifford v. Meyer*, 6 Ind. App. 633; *Mullen v. Bower*, 26 Ind. App. 253; *Welch v. Young* (Iowa) 79 N. W. 59; *Jones v. Adler*, 34 Md. 440; *Desmond v. Stebbins*, 140 Mass. 339; *Rogers v. Evangelical Baptist Benev. & Missionary Soc.*, 168 Mass. 592; *Wood v. Wells*, 103 Mich. 320; *Humphrey v. Eddy Transp. Co.*, 115 Mich. 420; *Timberman v. Craddock*, 70 Mo. 638; *Bass v. Jacobs*, 63 Mo. App. 393; *Brennan v. Roach*, 47 Mo. App. 290; *McClave v. Paine*, 49 N. Y. 561, 10 Am. Rep. 431; *Lyon v. Mitchell*, 36 N. Y. 235, 93 Am. Dec. 502; *Moses v. Bierling*, 31 N. Y. 462; *Stillman v. Mitchell*, 2 Rob. (N. Y.) 523; *Graves v. Bains*, 78 Tex. 92; *Bowser v. Field* (Tex.) 17 S. W. 45; *Barnes v. German Sav. & Loan Soc.*, 21 Wash. 448; *Stewart v. Mather*, 32 Wis. 344.

²³⁷ *Kock v. Emmerling*, 22 How. (U. S.) 69; *Cook v. Forst*, 116 Ala. 395; *Williams v. Bishop*, 11 Colo. App. 378; *Lincoln v. McClatchie*, 36 Conn. 136; *Hoadley v. Savings Bank of Danbury*, 71 Conn. 599; *Smith v. Anderson*, 2 Idaho, 537; *Hafner v. Herron*, 165 Ill. 242; *Snyder v. Fearer*, 87 Ill. App. 275; *Loehde v. Halsey*, 88 Ill. App. 452; *Ratts v. Shepherd*, 37 Kan. 20; *Plant v. Thompson*, 42 Kan. 664; *Woods v. Stephens*, 46 Mo. 555; *Grether v. McCormick*, 79 Mo. App. 325 (or on the value of property taken in exchange); *Crone v. Mississippi Valley Trust Co.*, 85 Mo. App. 601; *Traynor v. Morse*, 55 Neb. 595; *Martin v. Stillman*, 53 N. Y. 615; *Hobbs v. Edgar*, 23 Misc. (N. Y.) 618; *Levy v. Coogan*, 9 N. Y. Supp. 534; *Raeder v. Butler*, 19 Pa. Super. Ct. 604; *Byrd v. Frost* (Tex. Civ. App.) 29 S. W. 46; *Barnes v. German Sav. & Loan Soc.*, 21 Wash. 448; *Reynolds v. Tompkins*, 23 W. Va. 229; *Stewart v. Mather*, 32 Wis. 344.

tiations; nor does the fact that the negotiations were first successful, and were declared by him to be terminated, release him, provided they are continued by him to be successful.²³⁸

— **Abandonment.** But if the broker abandons his efforts before they have been successful, in producing a sale, he will not be entitled to commissions, although a sale is made to the same party with whom he had been previously negotiating.²³⁹ As has been said "It follows, as a necessary deduction from the established rule, that a broker is never entitled to commissions for unsuccessful efforts, the risk of failure is wholly his. The reward comes only on success. That is the plain contract and contemplation of the parties. The broker may expend his time and money and expend his money with ever so much of devotedness in the interest of his employer, and yet if he fails, if without effecting an agreement or accomplishing a bargain, he has made the effort, or his authority is fairly and in good faith terminated, he gains no rights to commissions. He is entitled to the labor and effort which was staked upon success. In such event it matters not that after his failure, and the termination of his agency, what he has done proves of benefit to the principal. In a multitude of cases this necessarily result. He may have introduced to each other parties who otherwise would have never met; he may have created impressions, which under later and more favorable circumstances naturally lead to and materially assist the consummation of a sale; he may have planted the seed from which others reap the harvest; but all that gives him no claim. It was part of his risk that failing in his efforts to be successful in fulfilling his obligation, others might

²³⁸ *Fox v. Byrnes*, 52 N. Y. Super. Ct. 150. Nor by material changes in the terms of the sale. *Cook v. Forsyth*, 395; *Snyder v. Fearer*, 87 Ill. App. 275.

²³⁹ *Doonan v. Ives*, 73 Ga. 295; *Lipe v. Ludewick*, 14 Ill. App. 399; *Mears v. Stone*, 44 Ill. App. 378; *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378, 38 Am. Dec. 415; *Wylie v. Marine Nat. Bank*, 61 N. Y. 415; *Bouscher v. L. Hun* (N. Y.) 288; *Markus v. Kenneally*, 19 Misc. (N. Y.) 288; *Cummins*, 54 Pa. 394, 93 Am. Dec. 718.

some extent to avail themselves of the fruits of his labors."²⁴⁰

777. Where completion of the contract is prevented.

If, instead of the contract being completed, its consummation is prevented by the principal, after the broker has performed his duty, by producing a person who was able, ready, and willing to buy or sell upon the terms proposed by his principal, the broker would still be entitled to his commissions. Thus, if the broker has performed his part of the contract, he would not be deprived of his commissions by the principal refusing to deliver the property;²⁴¹ even though the contract provides that no commissions shall be paid until the sale is consummated by the delivery of the deed.²⁴² Nor would he be deprived of his commissions by the principal revoking his authority and refusing to sell, after the latter has found and produced a party ready and willing to purchase;²⁴³ nor by the principal's having placed and for sale on commission, knowing that a portion of it belongs to another person, and refusing to give a deed unless he is paid for that portion;²⁴⁴ nor because the contract is not specifically enforceable and is canceled by the parties there;²⁴⁵ nor because the principal's wife refuses to join in the conveyance;²⁴⁶ nor if the failure to complete the sale is

²⁴⁰ *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378, 38 Am. Rep. 444.

²⁴¹ *Stauffer v. Linenthal*, 29 Ind. App. 305; *Bird v. Phillips*, 115 Wa. 703; *Brown v. Grassman*, 53 App. Div. (N. Y.) 640; *York v. Nash*, 42 Or. 321; *Kelly v. Phelps*, 57 Wis. 425. Compare *DeLafield Smith*, 101 Wis. 664, 70 Am. St. Rep. 938.

²⁴² *Gauthier v. West*, 45 Minn. 192. Or though his compensation to consist of a percentage of the price obtained. *Stauffer v. Linenthal*, 29 Ind. App. 305.

²⁴³ *Prickett v. Badger*, 1 C. B. (N. S.) 296; *Tombs v. Alexander*, 1 Mass. 255, 3 Am. Rep. 349; *Durkee v. Vermont Cent. R. Co.*, 29 Vt. 127; *Holden v. Starks*, 159 Mass. 503, 38 Am. St. Rep. 451; *York v. Nash*, 42 Or. 321. But see *Kirwan v. Barney*, 29 Misc. (N. Y.) 614.

²⁴⁴ *Cawker v. Apple*, 15 Colo. 141.

²⁴⁵ *Mattes v. Engel*, 15 S. D. 330.

²⁴⁶ *Clapp v. Hughes*, 1 Phila. (Pa.) 382; *Goldberg v. Gelles*, 33 Misc. (N. Y.) 797.

by reason of a defect in the title of the seller, and any fault of the broker,²⁴⁷ as where the title to land is in his wife's name.²⁴⁸ So a broker employed to sell land who is ignorant of their legal status, has a right to demand that they are valid; and if he finds a purchaser able and willing to buy at a price and on terms satisfactory to him of the bonds, and the sale fails because of their defect, he is entitled to his commissions, though by his contract he is to be paid only if the sale is effected, and he has realized therefrom by the seller;²⁴⁹ and it is immaterial whether his employer, after the time for performing the contract,

²⁴⁷ *Birmingham L. & L. Co. v. Thompson*, 86 Ala. 14; *Block v. Ryan*, 4 App. D. C. 28; *Morgan*, 96 Ga. 518; *Goodridge v. Holladay*, 18 Ill. App. 92; *Hotchkiss*, 10 Ill. App. 603; *Boland v. Kistle*, 92 Ill. App. 59; *Welch v. Young (Iowa)* 79 N. W. 59; *Remington v. Seligman*, 100 N. Y. 100; *Reid v. Thompson*, 20 Ky. L. R. 1887, 50 Ky. 100; *Coleman's Ex'r v. Meade*, 13 Bush (Ky.) 358; *Roche v. Mass.* 595, 79 Am. St. Rep. 345; *Monk v. Parker*, 180 Mich. 110; *Stange v. Gosse*, 110 Mich. 153; *Hannan v. Moran*, 71 Mich. 192; *Gauthier v. West*, 45 Minn. 192; *Hamlin v. Schulte*, 34 Minn. 192; *Roberts v. Kimmons*, 65 Miss. 332; *Hynes' Ex'r v. Brett*, 100 N. Y. 100; *Doty v. Miller*, 43 Barb. (N. Y.) 529; *Glavin v. Luther*, 21 Barb. (N. Y.) 145; *Knapp v. Wallace*, 41 Barb. 145; *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378, 38 Am. St. Rep. 168; *Cohen v. Farley*, 28 Misc. (N. Y.) 168; *Gorman v. Haas*, 130 Pa. 193; *Restein v. McCadden*, 166 Pa. 340; *Cheatham v. Peter*, 88 Wis. 316, 43 Am. St. Rep. 906.

If a broker effects a sale according to the terms specified through a supposed mistake as to the identity of the land, and draws from the sale, he is entitled to his commission, even if the owner desires to procure a higher price and does not labor under the same mistake as to the identity of the land. *Sayre v. Ala.* 151. So where a contract is made to pay to an agent a certain share of the purchase price for the sale of a real estate, whether the sale is made by the agent or principal, is not affected or defeated by the fact that the principal had, at the time of the contract, only a possessory title to the land, and he procured the legal title, and sold it as land. *Campbell v. 87 Cal.* 428.

²⁴⁸ *Rounds v. Alee*, 116 Iowa, 345.

²⁴⁹ *Berg v. San Antonio St. R. Co.*, 17 Tex. Civ. App. 17.

le has expired, procures the defect to be cured within a reasonable time, with the knowledge and consent of the broker and proposed purchaser and the latter still refuses to take and pay for the bonds.²⁵⁰ But if the broker is informed of the defect in the owner's title, and conceals it from the purchaser, and represents to the owner that he has fully informed the purchaser of such defect, and the sale fails through such fault of the broker, he could recover no commission.²⁵¹

Nor can the principal deprive the broker of his right to commissions by changing the terms proposed, without notice to him;²⁵² nor by the vendor and vendee entering into a new contract, and canceling the old contract which the broker was instrumental in effecting, although the broker was to receive commissions from earnings made possible by the old contract;²⁵³ and it is not essential to the broker's right to recover that the new contract should have been made with fraudulent intent to deprive him of his rights under the former one;²⁵⁴ nor if the sale is not consummated by reason of some misrepresentations of the principal.²⁵⁵ Nor would the broker be deprived of his commissions by the principal refusing or neglecting, in some other way, without just cause, to consummate the sale or purchase,²⁵⁶ though it would be

²⁵⁰ *Berg v. San Antonio St. R. Co.*, 17 Tex. Civ. App. 291.

²⁵¹ *Hynes' Ex'x v. Brettelle*, 70 Mo. App. 344; *Culp & Co. v. Powell*, 10 Mo. App. 238; *Berg v. San Antonio St. R. Co.*, 17 Tex. Civ. App. 291.

²⁵² *Stewart v. Mather*, 32 Wis. 344; *Bash v. Hill*, 62 Ill. 216; *Gorman v. Scholle*, 13 Daly (N. Y.) 516; *Nesbitt v. Helser*, 49 Mo. 383; *Kock v. Forst*, 116 Ala. 395; *Halprin v. Schachne*, 27 Misc. (N. Y.) 55; *Veatch v. Norman*, 95 Mo. App. 500. See *Finley v. Dyer*, 79 Mo. App. 604.

²⁵³ *Bishop v. Averill*, 17 Wash. 209. See *Corbel v. Beard*, 92 Wash. 360.

²⁵⁴ *Bishop v. Averill*, 17 Wash. 209.

²⁵⁵ *Washburn v. Bradley*, 169 Mass. 86.

²⁵⁶ *Nosotti v. Auerbach*, 79 Law T. (N. S.) 413; *Watson v. Brooks*, 13 Sawy. 316, 13 Fed. 540; *Kock v. Emmerling*, 22 How. (U. S.) 69; *Callivan v. Milliken*, 113 Fed. 93; *Middleton v. Findla*, 25 Cal. 76; *Eske v. Soule*, 87 Cal. 313; *Neilson v. Lee*, 60 Cal. 555; *Phelan v. Gardner*, 43 Cal. 306; *Smith v. Schiele*, 93 Cal. 144; *Fenn v. Ware*, 10 Ga. 563; *Wolven v. Shoudy*, 66 Ill. App. 42; *Lawrence v. Rhodes*,

otherwise if it had been agreed that the contract was to be approved by the owner.²⁵⁷ Nor would the transferring the property to another prevent the broker from recovering commissions for services rendered.²⁵⁸ In the above circumstances, countenance was at one time given to the proposition that the remedy of the broker was quantum meruit for work done;²⁵⁹ but it is now well settled that the broker's remedy in such cases is to sue the principal for his commission.²⁶⁰

87 Ill. App. 672; *McFarland v. Lillard*, 2 Ind. App. 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

²⁵⁷ *Goin v. Hess*, 102 Iowa, 140; *Kiam v. Turner*, 2 Mo. App. 417.

²⁵⁸ *Lane v. Albright*, 49 Ind. 275; *Reed's Ex'rs v. Reed*, 420; *Fox v. Byrnes*, 52 N. Y. Super. Ct. 150; *Woodall v. Tenn.* 195; *Ford v. Easley*, 88 Iowa, 603. Nor after the time were agreed upon, does transferring the property indicate a deed to a third party, who reconveyed to the broker's credit, relieve him from liability. *Williams v. Bishop*, 11 Colo. App. 1.

²⁵⁹ See *Drury v. Newman*, 99 Mass. 256; *Walker v. Newman*, 257, 3 Am. Rep. 352; *Prickett v. Badger*, 1 C. B. 1.

²⁶⁰ *Cadigan v. Crabtree*, 179 Mass. 474, 88 Am. St. Rep. 695. See cases cited in preceding notes of this section. *Combs v. Henderson*, 120 Mo. 367, 41 Am. St. Rep. 695.

— **Fault of purchaser.** If, however, the failure to complete the contract is caused by a fault of the purchaser, and without any fault on the part of the vendor, the broker could recover no commissions.²⁶¹

If the broker had been employed by the purchaser, and the latter refuses to carry out his contract with the vendor, he is nevertheless liable to the broker for commissions for services rendered, though the broker had agreed to look to the vendor for it.²⁶²

§ 778. **Performance within a limited time.**

If the contract of employment between the broker and principal provides that the undertaking shall be performed within a limited time, the broker is not entitled to, nor can he demand, commissions for services not accomplished by him within that time.²⁶³ Thus, where a broker has been allowed a reasonable time to produce a purchaser and effect a sale, and has failed so to do, and the principal in good faith and fairly has terminated the agency, and sought other assistance by the aid of which a sale is consummated, the fact that the purchaser is one whom the broker introduced, and that the sale was in some degree aided by his previous unsuccessful efforts, does not give him a right to commis-

²⁶¹ *Beale v. Bond*, 84 Law T. (N. S.) 313; *Smith v. Schiele*, 93 Cal. 144; *Hildenbrand v. Lillis*, 10 Colo. App. 522; *Hanesley v. Bagley*, 109 Ga. 346; *Wilson v. Mason*, 158 Ill. 304, 49 Am. St. Rep. 162; *Pape v. Romey*, 16 Ind. App. 470; *Owen v. Ramsey*, 23 Ind. App. 285; *Thompson v. Sea Isle City*, 28 Misc. (N. Y.) 494; *Byrne v. Korn*, 25 Misc. (N. Y.) 509; *St. John v. Ticonderoga Pulp & Paper Co.*, 27 App. Div. (N. Y.) 14; *C. H. Diamond & Co. v. Hartley*, 38 App. Div. (N. Y.) 87; *Mainhart v. Poerschke*, 32 Misc. (N. Y.) 97; *Inge v. McCreery*, 60 App. Div. (N. Y.) 557; *Scott v. Gage* (S. D.) 92 N. W. 37; *Berg v. San Antonio St. R. Co.*, 17 Tex. Civ. App. 291; *Kiam v. Turner*, 21 Tex. Civ. App. 417; *Crockett v. Grayson*, 98 Va. 354 (or broker); *Seattle Land Co. v. Day*, 2 Wash. 451. But if such purchaser is produced and a contract of sale is entered into between the parties, the broker's right to commissions does not depend upon the performance of such contract by the purchaser. *Thain v. Philbrick*, 36 Misc. (N. Y.) 829.

²⁶² *Livermore v. Crane*, 26 Wash. 529.

²⁶³ *Sullivan v. Milliken*, 113 Fed. 93; *Smith v. Fairchild*, 7 Colo. 510; *McCarthy v. Cavers*, 66 Iowa, 342; *Fultz v. Wimer*, 34 Kan.

sions.²⁶⁴ But where he has, before the revocation of his authority, placed the transaction in such a position that success is practically certain and immediate, the revocation of his authority and termination of his agency, against the express provisions of the contract of employment, cannot deprive him of his right to a commission.²⁶⁵ So where the contract is to pay the broker a commission for a sale effected in any wise through his influence or instrumentality, at a certain time, if the broker induces a purchaser to enter into negotiations with the principal before the expiration of that time, he is entitled to his commissions, although the sale is not actually consummated until after such period has expired;²⁶⁶ and if the agency to sell extends over a year, and it is provided that the commissions shall be payable when the owners of the land shall withdraw the property from the market or sell it during the year, and the owners themselves, or through another agent, sell or exchange the land, then the brokers are entitled to their commissions, and need not show that they have produced or could have produced a purchaser within the time fixed by the contract.²⁶⁷ If the broker is given an exclusive right to sell within a certain time, he will be entitled to commissions for any sale made within that time, whether by himself or by another.²⁶⁸

576; *Wright v. Beach*, 82 Mich. 469; *Antisdel v. Canfield*, 229; *Beauchamp v. Higgins*, 20 Mo. App. 514; *Page v. C.* Mo. App. 524; *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 37; *Rep.* 441; *Watson v. Brooks*, 11 Or. 271. Compare *Griswold v. C.* 86 Ill. App. 406. The contract of employment may be indefinite as to time as regards one part of its terms, and definite as regards the other, and the broker's right to commissions will be determined accordingly. *Leslie v. Boyd*, 124 Ind. 320.

²⁶⁴ *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378, 38 Am. *Collier v. Johnson*, 23 Ky. L. R. 2453, 67 S. W. 830.

²⁶⁵ *Blumenthal v. Goodall*, 89 Cal. 251; *Lane v. Albright*, 275; *Smith v. Fairchild*, 7 Colo. 510; *Wilson v. Sturgis*, 226.

²⁶⁶ *Goffe v. Gibson*, 18 Mo. App. 1.

²⁶⁷ *Crane v. McCormick*, 92 Cal. 176; *Dobinson v. McDaniel*, Cal. 33. See, also, *Glover v. Henderson*, 120 Mo. 367, 41 *Rep.* 695.

²⁶⁸ *Metcalf v. Kent*, 104 Iowa, 487.

But the mere fact that the time within which the broker is to perform his services is limited does not amount to an agreement that he shall have that whole time within which to perform his duty, and that the principal cannot, without his consent, terminate his agency before the expiration of that period.²⁶⁹

§ 779. Where there is more than one broker.

In the absence of an express agreement to the contrary, the employment of one broker does not preclude the employment of another to procure a purchaser for the same property,²⁷⁰ and where there are several brokers thus separately engaged in the same transaction, it is the duty of the broker who procures a purchaser, in order to secure his commissions, to report the name and offer to his principal, that the latter may be notified in time, and thus put upon his guard before he pays the commissions to another.²⁷¹ Thus, a real estate broker cannot recover in an action against the vendor for commissions where he reports an offer for property to his principal, without stating who makes it, and the same property is afterwards sold through another broker, to whom a commission is paid, for the same price, and to the same purchaser, unless it appears in evidence that the seller knew who the purchaser was, and of the sale to him, or that notice of these facts was given by the plaintiff before the completion of the contract with and payment of commissions to the second broker.²⁷² Where the principal thus employs several brokers, the agency of each is, of course, limited to the one transaction, and the sale of the subject-matter of the agency, either by one of the brokers or by the principal, terminates the authority of all the brokers, although no no-

²⁶⁹ *Brown v. Pforr*, 38 Cal. 550. But see *Glover v. Henderson*, 220 Mo. 367, 41 Am. St. Rep. 695.

²⁷⁰ *Tinges v. Moale*, 25 Md. 480, 90 Am. Dec. 73; *Freedman v. Havemeyer*, 37 App. Div. (N. Y.) 518.

²⁷¹ *Tinges v. Moale*, 25 Md. 480, 90 Am. Dec. 73; *Vreeland v. Vetterlein*, 33 N. J. Law, 247.

²⁷² *Tinges v. Moale*, 25 Md. 480, 90 Am. Dec. 73; *Glascok v. Vanleet*, 100 Tenn. 603.

tice of such sale had been given to them, unless the notice of his contract required such notice.²⁷³

— **Procuring cause.** It is often a matter of difficulty to determine which of the several brokers are entitled to the commissions. If the brokers are engaged by one another's employment, it seems that the broker who is the procuring cause of the sale is the one who may recover the commissions; and if he has been the efficient cause of the sale, the fact that another broker or the principal himself has taken the matter into his own hands and completes it does not deprive the right of such broker to recover his commissions thereon.

²⁷³ *Ahern v. Baker*, 34 Minn. 98. A subsequent sale was subject to the risk of such revocation, and no action for damages would lie in such case unless the nature of the contract is such as to bind the principal.

²⁷⁴ *Carper v. Sweet*, 26 Colo. 547; *Daniel v. Columbus Land Co.*, 9 App. D. C. 483; *Barton v. Rogers*, 84 Ill. 231; *Singer & T. Stone Co. v. Hutchinson*, 83 Ill. App. 668; *Scott*, 69 Ill. App. 352; *Clifford v. Meyer*, 6 Ind. App. 63; *Ward v. Bell*, 99 Iowa, 545; *Eggleston v. Austin*, 27 Kan. 245; *Moore*, 53 Kan. 234; *Glenn v. Davidson*, 37 Md. 365; *Livezey*, 61 Md. 336; *Ward v. Fletcher*, 124 Mass. 224; *Whitcomb*, 170 Mass. 479, 64 Am. St. Rep. 317; *Douville v. Comstock*, 693; *Ahern v. Baker*, 34 Minn. 98; *Stinde v. Blesch*, 42 Mo. 578; *Brennan v. Roach*, 47 Mo. App. 290; *Wright v. Brown*, 35 App. Div. (N. Y.) 325; *Maracella v. Odell*, 3 Daly (N. Y.) 37; *Dreyer v. Rauch*, 42 How. Pr. (N. Y.) 22; *Freedman v. H.*, 37 App. Div. (N. Y.) 518; *Buehler v. Weiffenbach*, 21 Mich. 30; *Kifer v. Yoder*, 198 Pa. 308; *Duval v. Moody*, 24 Tex. 627.

If the owner has several agents employed to sell the land, and one has found a purchaser and has negotiated with him, and the land at a certain stipulated price and on certain terms, and from those specified in the authority to sell, and when about to be consummated, another agent of the owner comes to the same person, who talks to him about the offer of the first agent, with full knowledge of the negotiations of the first agent, and the second agent sells to such person the same property for a cash price, but on the same terms as to cash down and time in which to pay the deferred payments, and the owner is ignorant of the negotiations of the first agent with the purchaser, but ratifies the sale made by the second agent made on the terms proposed by the first agent.

Thus, where several brokers have each endeavored to bring about a sale which finally is consummated, it may happen that each has contributed something without which the result would not have been reached. One may have found the customer who otherwise would not have been found, and yet the customer may refuse to conclude the bargain through his agency; and another broker may succeed where the first has failed. In such a case, in the absence of an express contract, that one only is entitled to a commission who can show that his services were the really effective means of bringing about the sale.²⁷⁵ There cannot be a recovery in favor of both, though both have rendered services meritorious and essential in producing the result, and without which it would not have been accomplished. A discrimination must be made between them to ascertain whose services must be deemed the efficient and effective cause of the sale,²⁷⁶ and in suit by a broker for commissions, evidence may be introduced on behalf of the defendant to show that the sale was effected by another broker.²⁷⁷

But if each broker knows of the employment of the other, and the principal does not favor one more than the other, he has performed his duty, and may sell to the buyer who first produced, and the broker producing such buyer would be entitled to his commission, independent of the question whether he was the procuring cause of the sale.²⁷⁸ "Each of such agents is aware that he is subject to the arts and

not liable to the second but to the first agent, and should pay him reasonable compensation for procuring said sale. *Reynolds v. Compkins*, 23 W. Va. 235.

²⁷⁵ *Whitcomb v. Bacon*, 170 Mass. 479, 64 Am. St. Rep. 318; *Smith McGovern*, 65 N. Y. 574; *Chandler v. Sutton*, 5 Daly (N. Y.) 112; *Einstein v. Golding*, 17 Misc. (N. Y.) 613; and see cases cited in text preceding note.

²⁷⁶ *Whitcomb v. Bacon*, 170 Mass. 479, 64 Am. St. Rep. 317.

²⁷⁷ *Newton v. Ritchie*, 75 Iowa, 91; *Goin v. Hess*, 102 Iowa, 140.

²⁷⁸ *Carper v. Sweet*, 26 Colo. 547; *Daniel v. Columbia Heights Land Co.*, 9 App. D. C. 483; *Stewart v. Woodward*, 7 Kan. App. 633; *Higgins v. Miller*, 22 Ky. L. R. 702, 58 S. W. 580; *Glenn v. Davidson*, Md. 365; *Vreeland v. Vetterlein*, 33 N. J. Law, 247; *Haines v. Barney*, 33 Misc. (N. Y.) 748; *Glascok v. Vanfleet*, 100 Tenn. 603. *See Feldman v. O'Brien*, 23 Misc. (N. Y.) 341.

chances of competition. If he finds a person who is willing to buy, and quits him without having effected a sale, he is aware that he runs the risk of such person falling into the influence of his competitor, and in such case, he may lose his labor. On the other hand, if fortune should be in favor of a bidder for the property on sale, who has been secured by his rival, may come to him, and by his means effect a gain."²⁷⁹

— **Abandonment.** If one of the several brokers abandons his efforts before he has completed his services, he cannot be entitled to any commissions. Thus, if one of the brokers notifies his principal that he cannot effect successful negotiations, he will have no right to commissions, although the broker, informed by him that the property is for sale, secures a purchaser.²⁸⁰ So where negotiations are begun by several brokers, but are afterwards abandoned, and the property is subsequently sold by another broker to the same party and upon substantially the same terms as those offered by the first broker, the first broker is not entitled to commissions.²⁸¹

§ 780. Requirement of license.

Where a statute, national or state, or a city ordinance, provides that a broker of any particular class shall not do business without first having taken out a license, and makes it an offense to engage in such business without having obtained the prescribed license, a broker who renders services in violation of such statute is not entitled to recover compensation therefor, although the transaction be in all other respects fairly negotiated by him.²⁸² And if, in such a

²⁷⁹ Beasley, C. J., in *Vreeland v. Vetterlein*, 33 N. J. L. 100.

²⁸⁰ *Holley v. Townsend*, 2 Hill. (N. Y.) 34.

²⁸¹ *Livezy v. Miller*, 61 Md. 336; *Staufer v. Bell*, 99 Iowa 100.

²⁸² *Douthart v. Congdon*, 197 Ill. 349, 90 Am. St. Rep. 167; *Pickands*, 27 Ill. App. 270; *Whitfield v. Huling*, 50 Ill. App. 361; *Eckert v. Collot*, 46 Ill. App. 361; *Richardson v. Brix*, 94 Ill. 100; *Yount v. Denning*, 52 Kan. 629; *Pratt v. Burdon*, 168 Kan. 100; *Buckley v. Humason*, 50 Minn. 195, 36 Am. St. Rep. 63; *Green*, 73 Pa. 198, 13 Am. Rep. 737; *Johnson v. Huling*, 49 Pa. 498, 49 Am. Rep. 131; *Costello v. Goldbeck*, 9 Phila. 100.

broker's charges for services form part of the entire consideration for notes given him by his customer, the notes are not enforceable.²⁸³ But the presumption is that the broker has complied with the statute and has taken out license, and where one alleges the contrary the burden of proof is on him to show it.²⁸⁴

These statutes, however, ordinarily only apply to those who carry on the business of brokers regularly; and a private individual who conducts negotiations only in a single or occasional sale may recover his commission, agreed upon, although he had no license;²⁸⁵ nor do they apply to one employed on a salary.²⁸⁶ It has been held that the sole object of these acts being to raise revenue, and not to declare the acts of an unlicensed broker illegal, the fact that a broker has not taken out such a license does not affect his right to recover on an express contract for a fixed commission.²⁸⁷

But the mere fact that a broker has acted without a license in violation of a city ordinance does not make the contract, which he has negotiated, invalid. He may be prosecuted and fined for so acting, but this does not invalidate his con-

Coles v. Meade, 5 Pa. Super. Ct. 334 (without a contract as to a specific amount); *Stevenson v. Ewing*, 87 Tenn. 46; *Saule v. Ryan* (Tenn. Ch. App.) 53 S. W. 977; *Stockard v. Morgan*, 105 Tenn. 412. But see *Amato v. Dreyfus* (Tex. Civ. App.) 34 S. W. 450; *Houston v. Boagni*, 1 McGloin (La.) 164.

²⁸³ *Douthart v. Congdon*, 197 Ill. 349, 90 Am. St. Rep. 167.

²⁸⁴ *Shepler v. Scott*, 85 Pa. 329; *Munson v. Fenno*, 87 Ill. App. 555.

²⁸⁵ *O'Neill v. Sinclair*, 153 Ill. 525; *Johnson v. Williams*, 8 Ind. App. 677; *Pope v. Beals*, 108 Mass. 561; *Chadwick v. Collins*, 26 Pa. 38; *Shepler v. Scott*, 85 Pa. 329; *Yedinskey v. Strouse*, 6 Pa. Super. Ct. 587; *Raeder v. Butler*, 19 Pa. Super. Ct. 604; *Jackson v. Hough*, 8 W. Va. 236. One who sells real estate for another under a special contract, without holding himself out as a real estate broker, may recover his commissions although he has not complied with the act requiring real estate brokers to take out a license. *Black v. Snook*, 204 Pa. 119.

²⁸⁶ *Portland v. O'Neill*, 1 Or. 218.

²⁸⁷ *Ruckman v. Bergholz*, 37 N. J. Law, 437; *Woodward v. Stearns*, 10 Abb. Pr. (N. S.; N. Y.) 395; *Fairly v. Wappoo Mills*, 44 S. C. 27; *Prince v. Eighth St. Baptist Church*, 20 Mo. App. 332.

tracts or affect their character as evidence.²⁸⁸ The rule that an action cannot be maintained which is based on a transaction prohibited by statute has no application to such contracts.²⁸⁹ The purchase of a bill of exchange by such a broker is valid, and he may recover thereon. If he may have incurred the penalty prescribed by the statute.

§ 781. Where broker acts for both parties.

(a) **In general.**—As a general rule, a broker cannot act for and receive commissions from both parties to the same transaction, unless they are fully informed that he is acting for both. It is clear, both upon principle and authority, that in case of such double employment he cannot recover from neither, where his employment by the other party was concealed from and not assented to by the defendant.

²⁸⁸ *Murray v. Doud*, 167 Ill. 368, 59 Am. St. Rep. 297.

²⁸⁹ *Murray v. Doud*, 167 Ill. 368, 59 Am. St. Rep. 297.

²⁹⁰ *Lindsey v. Rutherford*, 17 B. Mon. (Ky.) 245.

²⁹¹ *Morison v. Thompson*, L. R. 9 Q. B. 480; *Browne v. Jud. Que.* 19 C. S. 523; *Robbins v. Sears*, 23 Fed. 874; *Farwell (Cal.)* 31 Pac. 527; *Finnerty v. Fritz*, 5 Colo. 17; *v. Craft*, 3 Colo. App. 236; *Bates v. Copeland*, *MacArthur (C.)* 50; *Van Vlissingen v. Blum*, 92 Ill. App. 145; *Young* 158 Ill. 428; *Hampton v. Lackens*, 72 Ill. App. 442; *Kron* *Fricke*, 22 Ill. App. 550; *Simonds v. Hoover*, 35 Ind. 41; *Colston*, 5 Bush (Ky.) 587; *Ralsin v. Clark*, 41 Md. 1; *Rep.* 66; *Holcomb v. Weaver*, 136 Mass. 265; *Rice v. Mass.* 133, 18 Am. Rep. 459; *Farnsworth v. Hemmer*, 1 Al. 494, 79 Am. Dec. 756; *Walker v. Osgood*, 98 Mass. 348, 9; 168; *Follansbee v. O'Reilly*, 135 Mass. 80; *Leathers v. C. Mich.* 277; *McDonald v. Maltz*, 94 Mich. 172, 34 Am. St. *Scribner v. Collar*, 40 Mich. 375, 29 Am. Rep. 541; *Horv* *per*, 128 Mich. 688; *Webb v. Paxton*, 36 Minn. 532; *Chap* *rie*, 51 Mo. App. 40; *De Steiger v. Hollington*, 17 Mo. *Rosenthal v. Drake*, 82 Mo. App. 358; *Campbell v. Bart* 729; *Gracie v. Stevens*, 56 App. Div. 203, 171 N. Y. 65; *v. Reuther*, 25 Misc. (N. Y.) 161; *Southack v. Lane*, 32 M. 141; *Brierly v. Connelly*, 31 Misc. (N. Y.) 268; *Pugsley* 4 E. D. Smith (N. Y.) 245; *Capener v. Hogan*, 40 Oh. *Bell v. McConnell*, 37 Ohio St. 396, 41 Am. Rep. 528; *Ri* 136 Pa. 439, 20 Am. St. Rep. 931; *Cannell v. Smith*, 1 *Everhart v. Searle*, 71 Pa. 256; *Lynch v. Fallon*, 11 R. I. *Rep.* 458; *Armstrong v. O'Brien*, 83 Tex. 635; *Tinsley v.* 12 Tex. Civ. App. 591; *Meyer v. Hanchett*, 39 Wis. 419.

contrary to public policy to allow the broker a right of action against both parties for his commissions, and it is well settled that he does not have such right although he may have acted in good faith;²⁹² and evidence cannot be introduced to show a custom or usage among brokers to charge a commission to both parties in such cases.²⁹³

"Several reasons may be given for this rule. In law as in morals, it may be stated that as a principle no servant can serve two masters, for either he will hate the one and love the other or else he will hold to the one and despise the other. Unless the principal contracts for less, the agent is bound to serve him with a reasonable degree of skill, judgment, and discretion. The agent cannot divide his duty to his principal and give part to another. Therefore by the broker engaging with the second he forfeits his right to compensation from the one who first employed him. By the second engagement, the broker, if he does not in fact disable himself from rendering to the first employer the full quantum of service contracted for, at least tempts himself not to do so. And for the same reason he cannot recover from the second employer who is ignorant of the first engagement."²⁹⁴

And where one employs a broker knowing that he is acting for the other party in the same transaction, then both he and the broker are guilty of wrong committed against the employer, and the broker cannot recover compensation from the second employer, for the law will not enforce an executory contract entered into in fraud of the rights of others.²⁹⁵ It is no answer to say that the second em-

²⁹² *Bell v. McConnell*, 37 Ohio St. 396, 41 Am. Rep. 528; and cases cited in preceding note.

²⁹³ *Ralsin v. Clark*, 41 Md. 158, 20 Am. Rep. 66; *Rice v. Wood*, 113 Mass. 133, 18 Am. Rep. 459; *Farnsworth v. Hemmer*, 1 Allen (Mass.) 494, 79 Am. Dec. 756; *Walker v. Osgood*, 98 Mass. 348, 93 Am. Dec. 168; *Dartt v. Sonnesyn*, 86 Minn. 55. But see *Haviland v. Price*, 6 Misc. (N. Y.) 372.

²⁹⁴ *Bell v. McConnell*, 37 Ohio St. 396, 41 Am. Rep. 529.

²⁹⁵ *Morison v. Thompson*, L. R. 9 Q. B. 480; *Bollman v. Loomis*, 41 Conn. 581; *Ralsin v. Clark*, 41 Md. 158, 20 Am. Rep. 66; *Farnsworth v. Hemmer*, 1 Allen (Mass.) 494, 79 Am. Dec. 756; *Walker v. Osgood*, 98 Mass. 348, 93 Am. Dec. 168; *Smith v. Townsend*, 109 Mass. 500; *Rice v. Wood*, 113 Mass. 133, 18 Am. Rep. 459; *Brierly*

ployer having knowledge of the first employment, he will be held liable on his promise, because he could not be defrauded in the transaction. The contract itself is void against public policy and good morals and both parties are thereto being in *pari delicto*, the law will leave them to find them. *Ex dolo malo non oritur actio*.²⁹⁶ An agent to sell lands, having found a purchaser, and with the vendor's knowledge, signed the contract of sale on behalf of the vendee, may still recover his commission from the vendor,²⁹⁷ as this is merely performing a duty in putting the contract in form after it has been agreed between the parties, or after all the negotiations have been conducted.

(b) **Knowledge by both parties.**—But if both parties have full knowledge that the broker is acting in a double capacity as agent for each, and they, without objection, accept his services, or otherwise consent to his so acting, he will have a right to accept a retainer and commission from either party, but clear proof of such knowledge or consent must be shown.²⁹⁹

v. Connelly, 31 Misc. (N. Y.) 268; *Bell v. McConnell*, 31 N. Y. 396, 41 Am. Rep. 530; *Lynch v. Fallon*, 11 R. I. 311, 23 Am. Rep. 458. Compare *Geery v. Pollock*, 16 App. Div. (N. Y.) 321, 41 N. Y. 296, 37 Ohio St. 396, 41 Am. Rep. 530.
²⁹⁶ *Bell v. McConnell*, 37 Ohio St. 396, 41 Am. Rep. 530.
²⁹⁷ *Barry v. Schmidt*, 57 Wis. 172, 46 Am. Rep. 35.
²⁹⁸ *Finnerty v. Fritz*, 5 Colo. 174; *Alexander v. Northwestern Christian University*, 57 Ind. 466; *Leekins v. Nordyke*, 66 Mich. 396, 34 Am. Rep. 66; *Farnsworth v. Hemmer*, 1 Allen (Mass.) 348, 3 Am. Dec. 756; *Walker v. Osgood*, 98 Mass. 348, 93 Am. Rep. 530; *Rice v. Wood*, 113 Mass. 133, 18 Am. Rep. 459; *Scribner v. De Stelger*, 40 Mich. 375, 29 Am. Rep. 541; *De Stelger v. Hollington*, 4 App. 382; *Pugsley v. Murray*, 4 E. D. Smith (N. Y.) 245, 3 N. Y. 621; *Jarvis v. Schaefer*, 105 N. Y. 289; *v. Price*, 6 Misc. (N. Y.) 372; *Abel v. Disbrow*, 15 App. Div. 536; *Lamb v. Baxter*, 130 N. C. 67; *Bell v. McConnell*, 31 N. Y. 396, 41 Am. Rep. 528; *United States Rolling Stock Co. v. Atlantic & G. W. R. Co.*, 34 Ohio St. 450, 32 Am. Rep. 380; *v. West*, 23 Pa. Co. Ct. R. 302; *Everhart v. Searle*, 71 N. Y. 311, 23 Am. Rep. 458; *Armstrong v. O'Brien*, 83 Tex. 635.

²⁹⁹ *Frankel v. Wathen*, 58 Hun (N. Y.) 543.

(c) **After termination.**—Nor is a broker deprived of his commissions, if after the contract of sale is completed, he is employed generally by the purchaser and procures a modification of the contract of sale, extending time of payment.³⁰⁰ In such case, having completed his duty to his principal, he is entitled to his commissions, and the fact that he enters into the employ of the purchaser does not necessarily show bad faith on his part, though he uses his endeavors to procure a modification of the contract he had entered into in making for his former employer.

(d) **Where he acts as middleman.**—Where, however, the broker acts merely as a middleman to bring the parties together, and takes no part in the negotiations between them, they making their own bargain without his aid or interference, and each of them has agreed to pay him a commission, he may collect such commission from both, although each was ignorant of his employment by the other;³⁰¹ and his conduct in concealing from each his agreement with the other is not fraudulent, and is no defense to an action brought by him against either to recover the commission agreed upon.³⁰² As was said by Bigelow, C. J., in this case: "It might well be that the services of the plaintiff were of value to both parties, and that each might be willing to pay according to the benefit received by each. We know of no principle of law under which an agreement to pay for services rendered, honestly entered into, can be avoided on the ground that another per-

³⁰⁰ *Mattes v. Engel*, 15 S. D. 330.

³⁰¹ *Clark v. Allen*, 125 Cal. 276; *Green v. Robertson*, 64 Cal. 75; *Connelly v. Fritz*, 5 Colo. 174; *Manders v. Craft*, 3 Colo. App. 236; *Ex v. Haun*, 127 Ind. 325; *Mullen v. Keetzleb*, 7 Bush (Ky.) 253; *Rupp v. Sampson*, 16 Gray (Mass.) 398, 77 Am. Dec. 416; *Montross v. Eddy*, 94 Mich. 100, 34 Am. St. Rep. 323; *Ranney v. Donovan*, 78 Mich. 318; *Collins v. Fowler*, 8 Mo. App. 588; *Childs v. Ptomey*, 17 Ont. 502; *Shepherd v. Hedden*, 29 N. J. Law, 334; *Wyckoff v. Bliss*, 101 N. Y. 324; *Gracie v. Stevens*, 56 App. Div. 203, 171 N. Y. 8; *Stegel v. Gould*, 7 Lans. (N. Y.) 177; *Balheimer v. Reichardt*, 100 How. Pr. (N. Y.) 414; *Knauss v. Gottfried Krueger Brew. Co.*, 12 N. Y. 70; *Southack v. Lane*, 23 Misc. (N. Y.) 515; *Herman v. Martineau*, 1 Wis. 151, 60 Am. Dec. 368; *Barry v. Schmidt*, 57 Wis. 2, 46 Am. Rep. 35.

³⁰² *Rupp v. Sampson*, 16 Gray (Mass.) 398, 77 Am. Dec. 416.

son, having interests wholly distinct and independent, stipulated by a separate contract to pay for the same. Both contracts are valid; they are made upon good consideration; and each agrees to make compensation for which he expects to receive from the bargain. If the plaintiff would have stood on a very different ground if he had been employed as a broker to buy or sell, it would in such case have been a fraud for him to act as an agency for one from the other. The interests of the buyer and seller are necessarily adverse, and it would operate as a surprise on the confidence of both parties, and essential to their respective interests, if one person should, with full knowledge, act as the agent of both. Farebrother v. Farebrother, 5 Barn. & Ald. 333. But the plaintiff did not act in any such capacity. He was not an agent to buy or sell, but only acted as a middleman to bring the parties together in order to enable them to make their own contract. He stood entirely indifferent between them, and held no special relation in consequence of his agency as to render it adverse to the interests of either party." Thus, a broker employed by the owner of a farm to procure a tenant, who has no discretion or control over the conditions of the letting of the farm, may recover for his services, and receives compensation from the tenant procured, and the interests of the parties whom he represents are not conflicting.³⁰³

But although such cases may undoubtedly occur, the exceptional character should appear clearly before the broker can be exempted from the general principle."³⁰⁴ And even that, even if the broker had no authority to bind the principal, and was intrusted with no discretion in fixing the terms of the transaction, and his only service was to bring the parties together, he was bound to perform that service in the interest of the party who employed him.³⁰⁵ And it is not contended, on obviously good grounds, that it is not so for a broker, even where acting as a middleman only.

³⁰³ *Herman v. Martineau*, 1 Wis. 151, 60 Am. Dec. 303.

³⁰⁴ *Scribner v. Collar*, 40 Mich. 375, 29 Am. Rep. 543.

³⁰⁵ *Walker v. Osgood*, 98 Mass. 348, 93 Am. Dec. 169.

as agent for the other party without his principal's knowledge or consent. As has been said: "Such employment is not like the offer of a reward for the performance of some act which another may undertake or forego, as he shall please. Employment implies acceptance of the service. A broker thus employed does not act in good faith if he turn aside all proposals that are not accompanied with an additional retainer or commission. Yet such is the temptation upon him if he may levy a fee from both parties. When he has secured the retainer of the other party, he is interested, in order to win his double commission, to bring together these two to the exclusion of all others. The interests of his principal are in danger of prejudice from his counter-interest in the agent. And besides, the broker is ordinarily and almost inevitably intrusted, to a greater or less extent, with the confidence of his principal, and a knowledge of his views and purposes. This is incompatible with like relations to the other party. From the very nature and necessities of the case, such two-fold interests and relations of the broker are inconsistent with the interests of the principal, and should not be maintained without his knowledge and consent."³⁰⁶

§ 782. Where contract is illegal.

The law will not sanction the performance of contracts that are illegal, immoral, or opposed to public policy, and when a broker has, knowingly and willingly, performed services in a transaction of such character, he will not be entitled to any compensation or reimbursement therefor although his services are otherwise complete and regular.³⁰⁷ If, however,

³⁰⁶ Walker v. Osgood, 98 Mass. 348, 93 Am. Dec. 169.

³⁰⁷ Irwin v. Williar, 110 U. S. 499; Bangs v. Hornick, 30 Fed. 97; Cobb v. Prell, 5 McCrary, 80, 15 Fed. 774; National Bank v. Cunningham, 25 Am. Law Reg. (N. S.) 138; Beveridge v. Hewitt, 8 Ill. App. 467; Harvey v. Merrill, 150 Mass. 1, 15 Am. St. Rep. 159; Crawford v. Spencer, 92 Mo. 498; Zittle v. Schlesinger, 46 Neb. 844; Rogers v. Marriott, 59 Neb. 759; Flagg v. Baldwin, 38 N. J. Eq. 219, 48 Am. Rep. 308; Lyon v. Mitchell, 36 N. Y. 235, 93 Am. Dec. 502; Williams v. Carr, 80 N. C. 294; Kahn v. Walton, 46 Ohio St. 195; Waugh v. Beck, 114 Pa. 422, 60 Am. Rep. 354; Fareira v. Gabell, 89 Pa. 89; Smith v. Bouvier, 70 Pa. 325; Street v. Houston

the broker is not privy to the illegal intent of the principal in rendering the contract void, he has a meritorious ground for the recovery of compensation for services and advances.

As was said in a United States supreme court case, the point is: "It is certainly true that a broker might be privy to such a contract without being privy to the illegality of the principal parties to it, which renders it void. In such a case, being innocent of any violation of law, the broker, suing to enforce an unlawful contract, has a meritorious ground for the recovery of compensation for services and advances. But we are also of the opinion that when the broker is privy to the unlawful design of the parties, and he brings them together for the very purpose of entering into a contract, agreement, he is particeps criminis, and cannot recover for services rendered or losses incurred by himself on the contract, either in forwarding the transactions."³⁰⁹ Thus a contract for the sale of goods to be delivered in the future is not a voiding contract and void, if it be shown that both parties intended a delivery of the subject-matter, but contemplated only a settlement of the difference between the contract and the market price; and the broker, who negotiates the sale could not recover for services rendered or advances made if he were privy to such illegal agreement;³¹⁰

Ice & Brew. Co. (Tex. Civ. App.) 55 S. W. 516. See, also, *Spencer*, 18 Colo. 532, 36 Am. St. Rep. 303; *McCampbell*, 10 Colo. App. 242; *Johnson's Adm'r v. Hunt*, 81 Ky. 321.

³⁰⁸ *Irwin v. Williar*, 110 U. S. 499; *Roundtree v. Smith*, 13 S. 269; *Ponder v. Jerome Hill Cotton Co.*, 100 Fed. 3; *Patrick v. Adams*, 20 Fed. 287; *Bartlett v. Smith*, 4 McC. 13 Fed. 263; *Pape v. Wright*, 116 Ind. 502; *First Nat. Bank of Iowa v. Loosa Packing Co.*, 66 Iowa, 41; *Donovan v. Dalber*, 124 Mo. 498; *Crawford v. Spencer*, 92 Mo. 498; *Kent v. Miltenberger*, 13 Mo. App. 503; *Crane v. Whittemore*, 4 Mo. App. 510 (although he is not privy to the illegal character of the transaction but is not privy thereto); *Ormes v. Dauchy*, 45 N. Y. Super. Ct. 85, 82 N. Y. 200.

³⁰⁹ By Justice Matthews, in *Irwin v. Williar*, 110 U. S. 499. And see *Hatch v. Douglas*, 48 Conn. 116, 40 Am. Rep. 154; *Schall*, 65 Md. 289, 57 Am. Rep. 327; *Embrey v. Jamieson*, 15 S. 336; *Whitesides v. Hunt*, 97 Ind. 191, 49 Am. Rep. 441; *Lowry v. Berry*, 65 Me. 570; *Lowry v. Dillman*, 59 Wis. 197; *Spencer*, 18 Colo. 532, 36 Am. Rep. 303; *Lewis*, 65 Tex. 215, 57 Am. Rep. 593, 599.

³¹⁰ *Crawford v. Spencer*, 92 Mo. 498, 1 Am. St. Rep. 745.

the contract for future delivery is held valid there would be no question of the broker's right to recover his commissions.³¹¹ So where a broker procured a customer for another broker, with the understanding that the latter should charge for the procuring a loan of money at a rate prohibited by the statute, and that such commissions should be divided, it was held that a suit would not lie in behalf of the former broker for his share of such commissions against the latter broker, to whom they had been paid by the customer.³¹²

In some cases the broker's right to recover for commissions and advances has turned upon the fact that subsequent to the illegal transaction the principal executed his note to the broker for his commissions and advances therein.³¹³ So it is held that where the contract is executed, an agent or broker employed by the principal to make it can recover any money advanced in the transaction by the previous authority, or subsequent ratification, of the principal,³¹⁴ and the fact that the contract entered into by the parties is voidable under the statute of frauds, because not in writing, does not affect the right of the broker to recover for his services.³¹⁵

It has been held in England and in a few cases in this

v. Thompson, 85 Mo. 510; *Jamieson v. Wallace*, 167 Ill. 388, 59 Am. St. Rep. 302; *Harvey v. Merrill*, 150 Mass. 1, 15 Am. St. Rep. 159; *Wagner v. Hildebrand*, 187 Pa. 136; *Ponders v. Jerome Hill Cotton Co.*, 100 Fed. 373.

³¹¹ *Roundtree v. Smith*, 108 U. S. 269; *Teasdale v. McPike*, 25 Mo. App. 341; *Whitesides v. Hunt*, 97 Ind. 191, 49 Am. Rep. 441; *Smith v. Bouvier*, 70 Pa. 325; *Hatch v. Bartle*, 45 Pa. 166, 84 Am. Dec. 484; *Powell v. McCord*, 121 Ill. 330.

³¹² *Gregory v. Wilson*, 36 N. J. Law, 315, 13 Am. Rep. 448.

³¹³ *Hawley v. Bibb*, 69 Ala. 52; *Clarke v. Foss*, 7 Biss. 540, 553, Fed. Cas. No. 2,852; *Hentz v. Jewell*, 20 Fed. 592. See, also, *Lehman v. Strassberger*, 2 Woods, 554, Fed. Cas. No. 8,216.

³¹⁴ *Warren v. Hewitt*, 45 Ga. 501; *Thompson v. Cummings*, 68 Ga. 24; *Williams v. Carr*, 80 N. C. 294. But see *Cunningham v. National Bank*, 71 Ga. 400, 51 Am. Rep. 266, 269.

³¹⁵ *Bibb v. Allen*, 149 U. S. 481; *Sayre v. Wilson*, 86 Ala. 151; *McFarland v. Lillard*, 2 Ind. App. 160; *Holden v. Starks*, 159 Mass. 503, 38 Am. St. Rep. 451; *Mooney v. Elder*, 56 N. Y. 238; *Cook v. Kroemeke*, 4 Daly (N. Y.) 268; *Dennis v. Charlick*, 6 Hun (N. Y.) 21; *Barnard v. Monnot*, 3 Keyes (N. Y.) 203. But see *Wilson v. Mason*, 158 Ill. 304; *Trenholme v. McLennan*, 24 L. C. Jur. 305.

country, that the above rules against recovery by a wagering transactions do not apply to claims by stock and sharebrokers so as to defeat their recovery; on the other hand the right of a stockbroker to recover on a gambling transaction is denied, and on principle to be the better doctrine.³¹⁷

§ 783. Loan broker.

A broker who is employed to procure a loan is entitled to his commissions, when he produces a person who is able, and willing to lend the money upon the terms proposed,³¹⁸ although the principal declines to take the loan, although the negotiations go off by reason of such person covering unusual covenants or defects which the lender was not informed of.³²⁰ His right to commission depends upon the contingency of the applicant's acceptance of the loan, but upon his performance of his part of

³¹⁶ Wells v. Porter, 3 Scott, 141; Knight v. Fitch, 15 Rosewarne v. Billings, 15 C. B. (N. S.) 316; Wyman v. Allen (Mass.) 238, 80 Am. Dec. 66; Durant v. Bell, 98 Mass. 137; Stebbins v. Leowolf, 3 Cush. (Mass.) 137; Chambers, 15 C. B. 562; Jessopp v. Lutwyche, 10 Exch. 10.

³¹⁷ In re Green, 7 Biss. 338, Fed. Cas. No. 5,751; In re Green, 7 Fed. 739; Justh v. Holliday, 2 Mackey (D. C.) 346; Young, 20 Ill. App. 76; Pearce v. Foote, 113 Ill. 228, 5 Ill. 414; Flagg v. Baldwin, 38 N. J. Eq. 219, 48 Am. Rep. 308; v. De Haven, 97 Pa. 202; Dickson's Ex'r v. Thomas, 9 Pa. 10; North v. Phillips, 89 Pa. 250; Barnard v. Backhaus, 52 Pa. 10; Green v. Lucas, 31 Law T. (N. S.) 731; Green v. Fost. & F. 226; Vinton v. Baldwin, 88 Ind. 104, 45 Am. Rep. 44; Fitzpatrick v. Gilson, 176 Mass. 477; Caston v. Quimby, 153; Peterson v. Hall, 61 Minn. 268; Hackmann v. Gutweller, 61 Mo. App. 244; Budd v. Zoller, 52 Mo. 238; Van Orden v. Burling, 19 Misc. (N. Y.) 497; Burling v. Gunther, 12 Daly (N. Y.) 10; Peters v. Peters, 30 Misc. (N. Y.) 756; Lord v. Moran, 30 N. Y. 750.

³¹⁸ Vinton v. Baldwin, 88 Ind. 104, 45 Am. Rep. 44; Moran, 31 Misc. (N. Y.) 750; Hackmann v. Gutweller, 61 Mo. App. 244; Collier v. Weyman, 114 Ga. 944.

³²⁰ Green v. Lucas, 31 Law T. (N. S.) 731; Fitzpatrick v. Gilson, 176 Mass. 477; Clark v. H. G. Thompson & Son Co., 75 Mo. App. 197. And see Gatlin v. Spar Verein, 67 App. Div. (N. Y.) 50.

tract;³²¹ and the principal cannot deprive the broker of his commissions by refusing without good cause to accept the loan which the negotiations of the latter have resulted in securing.³²² And it has been held that the broker need not produce such person, nor a contract binding on him, if the borrower refuses to accept the loan or wrongfully discharges the broker after such person has been found by him.³²³

In the absence of an agreement as to the time within which the broker is to obtain the money, he is entitled to a reasonable time, and if within such time he finds a party ready, willing, and able to make the loan, he has earned his commissions.³²⁴

In principle, the case of a broker negotiating a loan is the same as that of a broker negotiating a sale of property, and in the latter case it is uniformly held that the commissions are earned when a purchaser is found able and willing to buy on the terms proposed. If the loan broker does not procure a proper lender he has not earned his commissions unless the principal sees fit to waive any deficiencies that occur; but if he has produced a proper person, as lender, the principal cannot deprive him of his commissions by neglecting or refusing to complete the loan, or by changing its terms; or because the security offered is defective.³²⁵ If, however, the loan is not made by reason of the person found by the broker, refusing without sufficient cause to accept the principal's title or make the loan, the broker would not be entitled to his commissions.³²⁶ Thus, if the person produced by the broker is willing to make the loan, but only upon certain terms which are not accepted by the principal, the broker's commissions are not earned.³²⁷

³²¹ *Vinton v. Baldwin*, 88 Ind. 104, 45 Am. Rep. 447; *Fitzpatrick v. Gilson*, 176 Mass. 477.

³²² *Vinton v. Baldwin*, 88 Ind. 104, 45 Am. Rep. 447; *Fitzpatrick v. Gilson*, 176 Mass. 477; *Collier v. Weyman*, 114 Ga. 944.

³²³ *Hackmann v. Gutweiler*, 66 Mo. App. 244.

³²⁴ *Peterson v. Hall*, 61 Minn. 268.

³²⁵ *Vinton v. Baldwin*, 88 Ind. 104, 45 Am. Rep. 447; *Green v. Lucas*, 31 Law T. (N. S.) 731; *Corning v. Calvert*, 2 Hilt. (N. Y.) 8; *Hackmann v. Gutweiler*, 66 Mo. App. 244.

³²⁶ *Marmaduke v. Martin*, 90 Mo. App. 629; *Hess v. Eggers*, 38 Misc. 726, 78 N. Y. Supp. 1119.

³²⁷ *Caston v. Quimby*, 178 Mass. 153, 52 L. R. A. 785

§ 784. Right to reimbursement and indemnity.

Besides the right to recover commissions on sales and changes of property, or other business transacted through his efforts, the broker also has a right to recover from his principal reimbursement for all costs and expenses, and indemnity for all losses and liabilities, bona fide incurred while performing such services for his principal, within his authority.³²⁸ Thus, if a broker buys property without disclosing his principal, he is personally liable for the purchase price, but he has a right to collect the same from his principal;³²⁹ and the latter can be relieved from such liability only by showing payment to the vendor, or a release of valuable consideration from the broker.³³⁰ So if the principal fails to consummate a sale made by his broker, the broker may maintain an action against him for any loss by reason thereof;³³¹ and it is no defense in such an action that the defendant was not bound to deliver except for a part of the price, where the brokers were not themselves purchasers.³³² A refusal to comply with a contract to sell real estate, by reason of which the broker who negotiated the sale is deprived of his commissions, will render the purchaser liable for the damages thereby suffered.

³²⁸ *Duncan v. Hill*, L. R. 8 Exch. 242; *Hawkins v. Martin*, 6 Eq. 505; *Marten v. Gibbon*, 33 Law T. (N. S.) 561; *Covington*, 22 Fed. 816; *Marshall v. Levy*, 66 Cal. 23; *Carnduff*, 14 Colo. App. 169; *Beach v. Branch*, 57 Ga. 30; *v. Butler*, 69 Ill. 575; *Taylor v. Bailey*, 169 Ill. 181; *Dietz*, 67 Iowa, 121; *Farrar v. Paine*, 173 Mass. 58; *Markland v. Wood*, 101 Mass. 470; *Van Dusen-Harrington Co. v. Johnson*, 101 Minn. 298, 74 Am. St. Rep. 463; *Lee v. Gargulio*, 45 N. Y. 595; *Schepeler v. Eisner*, 3 Daly (N. Y.) 11; *Minor v. Bly*, 141 N. Y. 399, 38 Am. St. Rep. 804; *Robinson v. Crawford*, 141 N. Y. 399, 38 Am. St. Rep. 804; *Robinson v. Crawford*, Div. (N. Y.) 228; *Jaekel v. Caldwell*, 156 Pa. 266; *Maitland v. Martin*, 86 Pa. 120; *Carpenter v. Momsen*, 92 Wis. 449.

³²⁹ *Knapp v. Simon*, 96 N. Y. 284; *Maitland v. Martin*, 120.

³³⁰ *Knapp v. Simon*, 96 N. Y. 284.

³³¹ *Bally v. Carnduff*, 14 Colo. App. 169; *Atkinson v. Bally*, N. C. 597.

³³² *Bally v. Carnduff*, 14 Colo. App. 169.

er, although he had agreed to look to the seller for his commissions.³³³

It is in an action to recover commissions, where the owner failed to consummate the contract, the broker cannot recover a sum, as exemplary damages for the breach of contract, in addition to the commission he would have received if the sale had been consummated.³³⁴ Nor can the broker recover reimbursement or indemnity for expenses or liabilities which were unnecessarily incurred by him,³³⁵ or were incurred while he was acting in violation of his principal's instructions, or in excess of his authority,³³⁶ or where expenses or liabilities were caused by his own neglect or misconduct.³³⁷ So where the transaction is illegal and the broker is privy to the illegal intent of the principal, he cannot recover for his losses incurred in the transaction,³³⁸ nor a bill executed in payment for such losses cannot be enforced by anyone having notice of the illegality.³³⁹ Where the broker fails to complete the transaction, which he undertook to perform, whether or not he is entitled to reimbursement and indemnity depends upon the nature of the transaction and the reason of his failure. As has been seen, a broker who is employed to sell or exchange property ordinarily contracts to find a purchaser who is ready, able and willing to buy upon the terms prescribed by the vendor, and if he does so is entitled to no compensation.³⁴⁰ He is at liberty to use whatever means he desires to accomplish this.

Olivermore v. Crane, 26 Wash. 529.

Cornell v. Hanna (Kan. App.) 53 Pac. 790; *Burnett v. Edling*, 100 N. D. 100, 101 N. D. 101, 102 N. D. 102, 103 N. D. 103, 104 N. D. 104, 105 N. D. 105, 106 N. D. 106, 107 N. D. 107, 108 N. D. 108, 109 N. D. 109, 110 N. D. 110, 111 N. D. 111, 112 N. D. 112, 113 N. D. 113, 114 N. D. 114, 115 N. D. 115, 116 N. D. 116, 117 N. D. 117, 118 N. D. 118, 119 N. D. 119, 120 N. D. 120, 121 N. D. 121, 122 N. D. 122, 123 N. D. 123, 124 N. D. 124, 125 N. D. 125, 126 N. D. 126, 127 N. D. 127, 128 N. D. 128, 129 N. D. 129, 130 N. D. 130, 131 N. D. 131, 132 N. D. 132, 133 N. D. 133, 134 N. D. 134, 135 N. D. 135, 136 N. D. 136, 137 N. D. 137, 138 N. D. 138, 139 N. D. 139, 140 N. D. 140, 141 N. D. 141, 142 N. D. 142, 143 N. D. 143, 144 N. D. 144, 145 N. D. 145, 146 N. D. 146, 147 N. D. 147, 148 N. D. 148, 149 N. D. 149, 150 N. D. 150, 151 N. D. 151, 152 N. D. 152, 153 N. D. 153, 154 N. D. 154, 155 N. D. 155, 156 N. D. 156, 157 N. D. 157, 158 N. D. 158, 159 N. D. 159, 160 N. D. 160, 161 N. D. 161, 162 N. 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result, but if his efforts are not successful, he has vain and can recover no compensation. When he himself to accomplish a certain result, he runs the risk of not only losing his commissions, but also whatever he incurs in advertising, traveling, and otherwise. His efforts, without any fault of the principal, fail to be successful.³⁴¹ If, however, the principal has expressly stipulated that certain means should be used, and the broker has used these in good faith and has failed, he could recover reimbursement for any expense incurred thereby. And if the broker has been allowed a reasonable time to perform his services, his authority is, without his fault, terminated by the principal, and the broker has already incurred expenses which were necessary in the performance of the services which he was employed to perform, he would be entitled to reimbursement for such expenses.³⁴²

§ 785. Broker's lien.

As a broker ordinarily has not the property of the principal in his possession, he, strictly speaking, can have no lien since he has nothing to which it can attach. But inasmuch as he usually does not have a right of general lien, he can, however, be in a situation to exercise the right of a special lien.³⁴³ Thus, where he sells a cargo of merchandise, he may have a lien upon the proceeds in his hands for his commissions in effecting the particular sale, though not for his entire claim against the owners.³⁴⁴ So he has a lien upon a deed delivered to him by his principal, for his commission in effecting the sale in pursuance of which the deed was executed, and for all his other services done in connection with the sale, but he does not have a general lien in such cases.³⁴⁵

³⁴¹ *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378; 38 Am. Dec. 163. *Didion v. Duralde*, 2 Rob. (La.) 163.

³⁴² *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378, 38 Am. Dec. 163. *Hill v. Jones*, 152 Pa. 433.

³⁴³ *Barry v. Boninger*, 46 Md. 59. See *Goad v. Harlan*, 197.

³⁴⁴ *Barry v. Boninger*, 46 Md. 59.

³⁴⁵ *Richards v. Gaskill*, 39 Kan. 428; *Carpenter v. M. W. Co.*, 105 Pa. 233. But see *Arthur v. Sylvester*, 105 Pa. 233.

holds certain chattels especially appropriated as security for a loan obtained by him from a third person, for his principal, he cannot, in the absence of a special agreement, take any part of the proceeds of such chattels for the payment of a debt due by the principal to him.³⁴⁶ So if securities are specifically pledged to a broker to secure the payment of a particular loan or debt, he has no lien thereon for a general balance, or for the payment of any other claim.³⁴⁷ But he has a lien on such securities, or their proceeds, if in his possession, for his commissions.³⁴⁸ So where the commission for selling real estate due from the vendor to the agent was assumed by the vendee at the time of purchase, without an agreement to that effect, the debt does not become a lien on the land.³⁴⁹ And where the broker has property to which the lien may attach, the lien must be for a debt due to him by the person whose property he has; and if for any reason he thinks or knows that such person is but an agent for another, he cannot retain the property for a debt due by such agent.³⁵⁰

An equitable lien may be created upon the property by express agreement, although the broker does not have possession of the property or its proceeds. Thus, where the owner of real estate, owing real estate brokers for negotiating a trade between him and a purchaser, executed a contract which was recorded in the office of the recorder of deeds and by which he agreed to give them the exclusive control of the sale of the land and to pay them out of the proceeds in the event of the sale, he thereby gives the brokers a lien upon the proceeds, for the amounts thus owing them.³⁵¹ And in such a case if the owner refuses to fix the price of the property,

³⁴⁶ James' Appeal, 89 Pa. 54. And see *Vinton v. Baldwin*, 95 Ind. 33.

³⁴⁷ *Wyckoff v. Anthony*, 9 Daly (N. Y.) 417; *Lane v. Bailey*, 47 Barb. (N. Y.) 395; *Leahy v. Lobdell, Farwell & Co.*, 80 Fed. 665; *Carpenter v. Momsen*, 92 Wis. 449; *Peterson v. Hall*, 61 Minn. 268.

³⁴⁸ *Peterson v. Hall*, 61 Minn. 268.

³⁴⁹ *Mayfield v. Turner*, 180 Ill. 332.

³⁵⁰ *Barry v. Boninger*, 46 Md. 59.

³⁵¹ *Tinsley v. Durfey*, 99 Ill. App. 239.

as he had reserved the right to do, and incumbent upon him with mortgages, the lien attaches at the time of such payment.

— **Insurance brokers.** By general usage, insurance brokers have a lien upon policies of insurance in respect to moneys procured by them for their principals, and also upon moneys received by them upon such policies, for the payment of any sums due to them for commissions, disbursements, advancements, and services in and about his agency. An insurance broker, but not for any balance due him in respect to moneys unconnected with his business as insurance broker. If a subagent of the insurance broker has made expenses in rendering services in the procurement of such policies, the broker has a lien on the policy, if in his hands for such expenses, but not for a general balance due to him by the principal broker.³⁵⁴

VI. DUTIES AND LIABILITIES OF BROKER AS TO THIRD PARTIES.

§ 786. Where principal is disclosed—Undisclosed.

It is well established that a broker, like all other agents, cannot be held personally liable to a third party for a contract authorized contract made by him for a disclosed principal. If, however, the broker makes the contract in his own name without disclosing his principal, he thereby becomes personally liable upon such contract, although the principal may be held liable, when disclosed, and in such case the principal may elect whether to sue the broker or the principal.

³⁵² *Tinsley v. Durfey*, 99 Ill. App. 239.

³⁵³ *McKenzie v. Nevius*, 22 Me. 138, 38 Am. Dec. 29; *Davidson*, 2 Camp. 218; *Fisher v. Smith*, 4 App. Cas. 101; *Barnard*, 8 Taunt. 149; *Moody v. Webster*, 3 Pick. 101; *Cranston v. Phila. Ins. Co.*, 5 Bin. (Pa.) 538; *Spring v. M'Intosh*, 11 Ala. Ins. Co., 8 Wheat. (U. S.) 268; *Sharp v. Whipple*, 10 N. Y. 557.

³⁵⁴ *McKenzie v. Nevius*, 22 Me. 138, 38 Am. Dec. 29; *Henderson*, 1 East, 335; *Snook v. Davidson*, 2 Camp. 218; *Hoyt*, 2 Johns. Cas. (N. Y.) 327.

³⁵⁵ *Deslandes v. Gregory*, 2 El. & El. 602; *Gadd v. Exch. Div.* 357; *Damora v. Craig*, 48 Fed. 736; *Tiller v. Exch. Div.* 39 Ga. 35; *Wright v. Cabot*, 89 N. Y. 570; *Bailey v. G. Tenn.* 599; *Beetle v. Anderson*, 98 Wis. 5.

³⁵⁶ *Calder v. Dobell*, L. R. 6 C. P. 486; *Jones v.*

And the broker will not be relieved from such liability by the fact that the third party supposed that he was acting in a representative capacity if he did not know whom he was representing;³⁵⁷ though if the third party actually knew, or had sufficient knowledge to create an inference, that the broker was acting as agent for another, it would be otherwise, although the name of the principal is not disclosed; and the real principal could so assert his rights as to cut off equities which had grown up between such third person and the broker.³⁵⁸

Thus, where a broker sells a note for cash, without disclosing the name of his principal, and the signature turns out to be forged, he is liable to the purchaser for the amount paid for it.³⁵⁹ If, however, he discloses the name of his principal, and has paid the money over to him, he cannot be held liable.³⁶⁰ If the third party elects to sue the undisclosed principal, he must take the account between the principal and broker as he finds it when he first discovers the

Adol. & E. 486; *Fleet v. Murton*, L. R. 7 Q. B. 126; *Pike v. Ongley*, 8 Q. B. Div. 708; *Hutcheson v. Eaton*, 13 Q. B. Div. 861; *York County Bank v. Stein*, 24 Md. 447; *Cobb v. Knapp*, 71 N. Y. 348, 7 Am. Rep. 51; *Knapp v. Simon*, 96 N. Y. 284; *Beebee v. Robert*, 2 Wend. (N. Y.) 413, 27 Am. Dec. 132; *Beymer v. Bonsall*, 79 Pa. 98; *Lichten v. Verner*, 8 Pa. Dist. R. 218; *Falkenburg v. Clark*, 1 R. I. 278; *Baldwin v. Leonard*, 39 Vt. 266, 94 Am. Dec. 324.

³⁵⁷ *Cobb v. Knapp*, 71 N. Y. 348, 27 Am. Rep. 51; *Wilder v. Cowles*, 100 Mass. 487; *Thomson v. Davenport*, 9 Barn. & C. 78; *Baldwin v. Leonard*, 39 Vt. 360, 94 Am. Dec. 324.

³⁵⁸ *Wright v. Cabot*, 89 N. Y. 570; *Baxter v. Duren*, 29 Me. 434, 50 Am. Dec. 602; *Bliss v. Bliss*, 7 Bosw. (N. Y.) 345; *Baring v. Corle*, 2 Barn. & Ald. 137, 144.

³⁵⁹ *Thompson v. McCullough*, 31 Mo. 224, 77 Am. Dec. 644; *Gurley v. Womersley*, 4 El. & Bl. 133; *Séré v. Faures*, 15 La. Ann. 189; *Merriam v. Wolcott*, 3 Allen (Mass.) 258, 80 Am. Dec. 69; *Canal Bank v. Bank of Albany*, 1 Hill (N. Y.) 287; *Dumont v. Williamson*, 18 Ohio St. 515, 98 Am. Dec. 186; *Aldrich v. Jackson*, 5 R. I. 218.

³⁶⁰ *Morrison v. Currie*, 4 Duer (N. Y.) 79; *Thomson v. Davenport*, 9 Barn. & C. 78; *Baxter v. Duren*, 29 Me. 434, 50 Am. Dec. 602; *Fisher v. Rieman*, 12 Md. 497; *Merriam v. Wolcott*, 3 Allen (Mass.) 258, 80 Am. Dec. 69; *Canal Bank v. Bank of Albany*, 1 Hill (N. Y.) 287.

principal; and if at that time the broker had been the third party can have no claim on the principal.

§ 787. Where exclusive credit is given to broker.

Of course the broker, if he so desires, may plead personal credit in the contract made for his principal, though the principal be known, and where he has given exclusive credit to the latter, the broker would be personally liable on the contract.³⁶² The presumption, however, where exclusive credit to the latter, the broker would be responsible.³⁶³ The presumption, however, where the principal is known, is that the broker intended to bind himself and not himself, and if the third party alleges the burden is on him to show it;³⁶⁴ and whether the broker has personally bound himself must be determined from all the circumstances of the case.³⁶⁵

§ 788. Liability for fraud.

So a broker is liable to the third person for loss from his fraud and deceit. He is guilty of fraud in a sale, when he was acquainted with the defect in the principal's title, and either directly affirmed what was false or threw the party off his guard by a willful and false representation of the truth.³⁶⁶ Thus when, knowing of a defect in his principal's title, he directs an investigation to a place where he knew no satisfactory information could be obtained, when he should have directed it to another point, where the truth could have been ascertained.³⁶⁷ But the broker is not liable for false

³⁶¹ *Armstrong v. Stokes*, L. R. 7 Q. B. 598; *Paine v. Colver*, 52 Conn. 532, 538; *McCullough v. Thompson*, 45 N. Y. 449.

³⁶² *Ante*, § 565.

³⁶³ *Ante*, § 565.

³⁶⁴ *Ante*, § 565. See *Baxter v. Duren*, 29 Me. 434, 50 A. 249.

³⁶⁵ *Ante*, § 565.

³⁶⁶ *Chisolm v. Gadsden*, 1 Strob. (S. C.) 220, 47 Am. L. 100; *Todd v. Bourke*, 27 La. Ann. 385; *Kice v. Porter*, 21 Ky. 53 S. W. 285; *Id.*, 22 Ky. L. R. 1704, 61 S. W. 266.

³⁶⁷ *Chisolm v. Gadsden*, 1 Strob. (S. C.) 220, 47 Am. L. 100.

tions, where he states that his information is derived from his principal, and the facts respecting which the representations are made are not such as would be peculiarly within his knowledge.³⁶⁸

§ 789. Liability for conversion.

If a broker obtains possession of goods from one having no title thereto or no authority to sell, and disposes of the same, he will be liable to the true owner as for a conversion. Thus, where a broker makes a sale of goods fraudulently obtained by his principal,³⁶⁹ or where he purchases for value and in good faith from one who has no title, and ships to his principal,³⁷⁰ he will be liable in trover to the true owner. It has been said that a broker acting merely as such and contracting only for and in behalf of his principal is not liable to the true owner as for a conversion where it appears that in the regular course of trade he has been employed by, and has sold goods for, one who, in good faith and in the exercise of reasonable prudence, he believed to be the owner.³⁷¹ But this is not the law. "It is no defense to an action of trover that the defendant acted as the agent of another. If the principal is a wrongdoer the agent is a wrongdoer also. A person is guilty of a conversion who sells the property of another, without authority from the owner, notwithstanding he acts under the authority of one claiming to be the owner, and is ignorant of such person's want of title."³⁷² A stockbroker who sells certificates of stock received by him for sale from one who has stolen them is guilty of a conversion of the stock, and liable therefor to the true owner, although the thief may have represented himself to be the owner, and the broker may have acted in good faith, and may have paid the proceeds over to the thief.³⁷³

³⁶⁸ *Griffing v. Diller*, 66 Hun (N. Y.) 633.

³⁶⁹ *Fowler v. Hollins*, L. R. 7 Q. B. 616; *Beard v. Milmine*, 88 Fed. 868.

³⁷⁰ *Williams v. Merle*, 11 Wend. (N. Y.) 80, 25 Am. Dec. 604.

³⁷¹ *Mechem, Agency*, § 961.

³⁷² *Kimball v. Billings*, 55 Me. 147, 92 Am. Dec. 581.

³⁷³ *Swim v. Wilson*, 90 Cal. 126, 25 Am. St. Rep. 110; *Bercich v. Marye*, 9 Nev. 312.

§ 790. Liability for unauthorized acts.

The rule applicable to other agents, in reference to liability to a third party for unauthorized acts in an assumed principal, also applies to the relation of broker and principal. Thus, where a broker knowingly, or, or mistakenly holds himself out, either expressly or impliedly, as having authority to act for a certain principal in a particular transaction, when in fact he has not such authority, or where he exceeds his authority, he will be liable to the party with whom he deals for any loss or injury which that party may have suffered by reason of such representation.

VII. LIABILITY OF PRINCIPAL TO THIRD PERSONS.

§ 791. In general.

The same principles apply to the liability of a principal for the acts of his broker as in other cases of agency. If the broker acts within the scope of his authority, he binds his principal to a third person by all acts so done as if the principal had done the same acts in person. If, however, the broker acts beyond the scope of his authority, his acts will not be binding on his principal; and it has been held that a broker cannot bind his principal beyond his express instructions, although he acts in conformity to the usual course of dealing between them.³⁷⁶

³⁷⁴ *Simmons v. More*, 100 N. Y. 140. See ante, § 577 et seq.

³⁷⁵ *Heyworth v. Knight*, 17 C. B. (N. S.) 298; *Pickering v. Lee*, 15 East, 38; *Calder v. Dobell*, L. R. 6 C. P. 486; *Whitcomb v. Merchants & P. Nat. Bank*, 64 Ala. 1, 38 Am. Rep. 1; *Melone v. Boardman*, 129 Cal. 514; *McBean v. Fox*, 1 Ill. App. 177; *Hopwood v. Boardman*, 63 Iowa, 218; *Dawson v. Chisolm*, 48 Hun (N. Y.) 62; *Littlejohn v. Littlejohn*, 27 App. Div. (N. Y.) 22. See ante, § 448 et seq.

³⁷⁶ *Clews v. Jamieson*, 89 Fed. 63; *Malone v. McCullough*, 460; *Baxter v. Lamont*, 60 Ill. 237; *Wanless v. McCandles*, 20; *Siebold v. Davis*, 67 Iowa, 560; *Gilbert v. Baxter*, 71; *Stollenwerck v. Thacher*, 115 Mass. 224; *Coddington v. Boardman*, 16 Gray (Mass.) 436; *Scull v. Brinton*, 55 N. J. Eq. 489; *Equitable Life Assur. Soc. (N. J. Eq.)* 37 Atl. 668; *Morris v. Boardman*, 20 N. J. Eq. 236; *Lawrence v. Gallagher*, 42 N. Y. Supp. 40; *Coleman v. Garrigues*, 18 Barb. (N. Y.) 60; *Davis v. Boardman*, Va. 559.

In *Clark v. Cumming*, 77 Ga. 64, 4 Am. St. Rep. 72,

tate broker cannot bind the owner by granting possession, or by making repairs, unless with the owner's consent.³⁷⁷

If the principal forbids the broker to bargain for him according to the peculiar usages of the stock exchange, and limits his authority to specified contracts, the broker could not bind him to a contract to be performed according to those usages. But if he does not limit his authority, then there is an implied authority to deal according to such usages.³⁷⁸ But the principal cannot limit the broker's authority by private instructions not known to the party dealing with him; and he will be bound by acts done by the broker within the line of his employment, although contrary to his express instructions, if the latter are not made known to the third party.³⁷⁹ This latter doctrine is conformable to the well established principle that when one of two innocent parties must suffer by the fraud or negligence of a third, he is to bear the loss who enabled the third person to do the injury, by giving him credit and holding him out to the world as his agent. A fortiori, if an innocent person sustains a loss, occasioned

J., said: "A broker is a special agent, and derives his power and authority to bind his principal from the instruction given to him by his principal. Code, sections 2194, 2196, 2184. * * * Where definite instructions are given by the principal to the broker to sell goods for him at a certain specified price for a certain time and day only, this will not authorize the broker to contract and sell the same kind of goods for his principal at a different and subsequent time for the same price; his power is limited by and ceases with his instructions; and this is so, even though it had been usual in the course of dealings between the broker and his principal for the broker to continue to sell at the price quoted last by the principal."

³⁷⁷ *Planer v. Equitable Life Assur Soc.* (N. J. Eq.) 37 Atl. 668.

³⁷⁸ *Rosenstock v. Tormey*, 32 Md. 179, 3 Am. Rep. 127, 128.

³⁷⁹ *Lobdell v. Baker*, 1 Metc. (Mass.) 193, 35 Am. Dec. 358; *Whitehead v. Tuckett*, 15 East, 400. In *Pickering v. Busk*, 15 East, 38, Lord Ellenborough says he could "not subscribe to the doctrine, that a broker's engagements are necessarily, and in all cases, limited to his actual authority; for it is clear that he may bind his principal within the limits of the authority with which he has been apparently clothed by the principal, in respect to the subject-matter; and there would be no safety in mercantile transactions if he could not."

by the fraud or misconduct of another person, the broker can be held responsible, although he can show that the loss could not have been incurred but for the misconduct of that person, especially if that person is his agent.³⁸⁰

VIII. RIGHTS OF PRINCIPAL AS TO THIRD PERSONS.

§ 792. In general.

Generally, the same rules apply to the rights of the principal against third persons on contracts made in his behalf by the broker, as apply in other agencies in similar cases. If the broker discloses his principal, the latter may disavow the contract, made by the broker in his behalf, the same as if it had been made by himself,³⁸² and this may or may not be done, even where the principal has not been disclosed to the third person. If the broker by false and fraudulent representation obtains goods from the owner, and disposes of them for his own benefit, an innocent third party purchasing from him in good faith obtains title to the goods, and the owner may recover them from him.³⁸⁴ If, however, the principal has knowingly and willingly entrusted the broker with the indicia of authority, by which a third party in good faith relied, in obtaining the goods, the principal cannot recover them from the third party.

§ 793. Third party cannot set off debt due by broker to principal.

The broker, as has been seen, usually does not deliver possession of the property with reference to which he has contracted.

³⁸⁰ *Lobdell v. Baker*, 1 Metc. (Mass.) 193, 35 Am. Dec. 101.

³⁸¹ Ante, § 523 et seq.

³⁸² Ante, §§ 524-527; *Thornton v. Meux, Moody & M.* 43 N. Y. 467.

³⁸³ *Humphrey v. Lucas*, 2 Car. & K. 152; *Langton v. V.* 6 Eq. 165; *Beebe v. Roberts*, 12 Wend. (N. Y.) 413, 27 Am. Dec. 101; *Graham v. Duckwall*, 8 Bush (Ky.) 12.

³⁸⁴ *Collins v. Ralli*, 20 Hun, 246, 85 N. Y. 637; *Soltan v. Thal*, 1 N. Y. Supp. 168; *Hentz v. Miller*, 94 N. Y. 64; *Schouder v. Dau*, 119 N. Y. 381, 16 Am. St. Rep. 843; *Rodliff v. D.* 1 Mass. 1, 55 Am. Rep. 439.

³⁸⁵ *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325, 7 Am. Dec. 101; *Henry v. Philadelphia Warehouse Co.*, 81 Pa. 76; *Hentz v. D.* 94 N. Y. 64.

contracts, nor does he have any indicia of title; and also he usually acts only in the name of the principal. These facts plainly show to one dealing with him that he is acting in a representative capacity, whether the principal's name is disclosed or not. Hence, where third persons deal with a broker, who has not the possession of the subject-matter of the agency, they are put upon their guard as to his true character; and they cannot, when sued by the principal, set off against such action obligations or debts due to them by the broker.³⁸⁶ Thus, where a person deals with a broker, knowing him to be such, although the principal's name is not disclosed, the third person cannot set off a claim due to him by the broker, in an action brought by the principal for the purchase price.³⁸⁷

IX. RIGHTS OF BROKER AS TO THIRD PERSONS.

§ 794. In general.

It has been seen that a broker acts merely in a representative capacity, as a go-between for his principal and third parties; and generally there are no contractual relations whatever between him, as broker, and a third person. Hence, the broker would have no right of action against a third person upon contracts entered into by him in behalf of his named principal.³⁸⁸ But it has also been seen that an agent may maintain an action in his own name against the third person upon contracts made between the parties where it is shown that the agent was in fact the principal; where he has contracted in his own name; or where the agent is himself specially interested in the contract.³⁸⁹ These rules generally apply to brokers as well as to other agencies. One dealing

³⁸⁶ *Baring v. Corrie*, 2 Barn. & Ald. 137; *Cooke v. Eshelby*, 12 App. Cas. 271; *Graham v. Duckwall*, 8 Bush (Ky.) 12; *Crosby v. Hill*, 39 Ohio St. 100; *Braden v. Louisiana State Ins. Co.*, 1 La. 220, 20 Am. Dec. 277.

³⁸⁷ *Bliss v. Bliss*, 7 Bosw. (N. Y.) 339; *Knapp v. Simon*, 96 N. Y. 284; *Evans v. Waln*, 71 Pa. 69; *Fisher v. Brown*, 104 Mass. 259, 6 Am. Rep. 235.

³⁸⁸ *Fairlie v. Fenton*, L. R. 5 Exch. 169; *Fawkes v. Lamb*, 31 Law J. Q. B. 98. See, also, *Paine v. Loeb*, 96 Fed. 164.

³⁸⁹ Ante, § 614 et seq.

with a person whom he knows to be a broker presumed to know from the nature of his business acting as agent for some third person;³⁹⁰ but although it is such a presumption, the broker may nevertheless bind himself in the contract by so contracting. And if he may sue on the contract in his own name. Even in cases the principal ordinarily may come in and assert rights in the contract to himself; but of course subject to rights that the third party may have acquired against the broker before the principal was disclosed.³⁹¹ But a broker in making the contract has disclosed the name of the principal, or that he was acting for a principal, and would have the right of action and not the broker.

In the case of insurance policies, however, there is an exception to this rule for as such policies are very often payable to the broker for the benefit of his principal. If the name is disclosed, or "for whom it may concern," it is the common practice to bring an action on such policy in the name of the insurance broker,³⁹² or in the name of the party for whom the insurance was effected.³⁹³ It has been held that unless the policy contains some general clause as "for whom it might concern" an action on the policy may be maintained only by the person who made it, therein, or for whose benefit it is expressed to be made. The insurance company cannot set off a debt due to

³⁹⁰ *Baxter v. Duren*, 29 Me. 434, 50 Am. Dec. 603.

³⁹¹ *Ante*, § 618½.

³⁹² *Sharman v. Brandt*, L. R. 6 Q. B. 720; *Fairlie v. Fairlie*, 5 Exch. 169.

³⁹³ *Farrow v. Commonwealth Ins. Co.*, 18 Pick. (Mass.) 564; *Jefferson Ins. Co. v. Cotheal*, 7 Wend. 22 Am. Dec. 567; *Sargent v. Morris*, 3 Barn. & Ald. 281; *Ins. Co. v. Leduc*, L. R. 6 P. C. 224.

³⁹⁴ *Farrow v. Commonwealth Ins. Co.*, 18 Pick. (Mass.) 564; *Sargent v. Morris*, 3 Barn. & Ald. 281; *Provincial Ins. Co.*, L. R. 5 P. C. 263; *Aldrich v. Equitable Ins. Co.*, 1 Woodb. & M. 276, Fed. Cas. No. 155; *Williams v. Ins. Co.*, 2 Metc. (Mass.) 305; *Somes v. Equitable Safe Co.*, 12 Gray (Mass.) 532.

³⁹⁵ *Newson v. Douglass*, 7 Har. & J. (Md.) 417, 16 Am. Dec. 532, and note.

the insurance broker against a debt due by them to the principal,³⁹⁶ in an action by the principal.

X. PARTICULAR KINDS OF BROKERS.

§ 795. Bill and note brokers.

(a) **In general.**—Bill and note brokers are brokers whose business it is to negotiate the purchase and sale of bills of exchange and promissory notes.³⁹⁷ If such a broker, in negotiating a purchase or sale of a bill or note, discloses not only his agency but also the name of the principal for whom he is acting, he is not a party to the contract; and if he acted in good faith and within the scope of his authority, he would be under no personal liability.³⁹⁸ If, however, he does not disclose the name of his principal, he himself will be liable as principal to the third person.³⁹⁹ And where, under such circumstances, the broker sells a bill or note, without indorsement or with a qualified indorsement, he will be liable upon an implied warranty that, not only has he authority to negotiate the paper, but also that all prior signatures were genuine; and the purchase price may be recovered back from him, where one or more of the signatures were forged.⁴⁰⁰

³⁹⁶ *Braden v. Louisiana State Ins. Co.*, 1 La. 220, 20 Am. Dec. 277; *Somes v. Equitable Safety Ins. Co.*, 12 Gray (Mass.) 532; *Williams v. Ocean Ins. Co.*, 2 Metc. (Mass.) 305; *Aldrich v. Equitable Safety Ins. Co.*, 1 Woodb. & M. 276, Fed. Cas. No. 155.

³⁹⁷ A person who receives from another certain notes for the purpose of negotiating their sale, which he does, charging a commission, is a broker. *American Valley Co. v. Wyman*, 92 Mo. App. 294.

³⁹⁸ *Lyons v. Miller*, 6 Grat. (Va.) 427, 52 Am. Dec. 131; *Fisher v. Rieman*, 12 Md. 497.

³⁹⁹ *Merriam v. Wolcott*, 3 Allen (Mass.) 258, 80 Am. Dec. 69; *Baxter v. Duren*, 29 Me. 434, 50 Am. Dec. 602; *Cabot Bank v. Morton*, 4 Gray (Mass.) 156; *Worthington v. Cowles*, 112 Mass. 30; *Thompson v. McCullough*, 31 Mo. 224, 77 Am. Dec. 644; *Morrison v. Currie*, 4 Duer (N. Y.) 79; *Canal Bank v. Bank of Albany*, 1 Hill (N. Y.) 287.

⁴⁰⁰ *Gurney v. Womersley*, 4 El. & Bl. 133; *Terry v. Bissell*, 26 Conn. 23; *McCay v. Barber*, 37 Ga. 423; *Bell v. Cafferty*, 21 Ind. 411; *Snyder v. Reno*, 38 Iowa, 329; *Challiss v. McCrum*, 22 Kan. 157, 31 Am. Rep. 181; *Smith v. McNair*, 19 Kan. 330, 27 Am. Rep. 117; *Parlange v. Faures*, 14 La. Ann. 444; *Sere v. Faures*, 15 La. Ann.

And this is so although the broker had paid the principal before it was demanded of him, if there been no unreasonable delay in giving him notice of the forgery after its discovery, and although the note was sold for less than its face value.⁴⁰¹ But he does not warrant the solvency of the prior parties.⁴⁰²

(b) **Note transferred in payment of debt or security.**—This right to recover the purchase price is denied where the note or bill was sold as property and transferred in the payment of a debt. Thus making a contract and allowing a recovery where the forged paper was transferred in payment of a debt, and denying such recovery where it had been sold as property.⁴⁰³ As has been said, "When no debt is created at the time, and the paper is sold as other goods or effects are, the purchaser cannot recover the purchase money from the seller. There is in such a sale no implied warranty of the genuineness of the paper. The law of the sale of goods is applicable. The only warranty is that the seller owns or is lawfully entitled to dispose of the property." But where the note is delivered in payment of a debt due, or then created * * * there is a warranty implied by law, that the paper is genuine.

189; *Merriam v. Wolcott*, 3 Allen (Mass.) 258, 80 Am. Dec. 427; *Worthington v. Cowles*, 112 Mass. 30; *Hussey v. Sibley*, 22 Am. Rep. 557; *Thompson v. McCullough*, 31 Mo. 224, 644; *Canal Bank v. Bank of Albany*, 1 Hill (N. Y.) 287; *Currie v. Currie*, 4 Duer (N. Y.) 79; *Dumont v. Williamson*, 515, 98 Am. Dec. 186; *Swanzy v. Parker*, 50 Pa. 441, 6 Am. Dec. 549; *Aldrich v. Jackson*, 5 R. I. 218; *Lyons v. Miller*, 6 Me. 427, 52 Am. Dec. 129.

⁴⁰¹ *Merriam v. Wolcott*, 3 Allen (Mass.) 258, 80 Am. Dec. 427; *Canal Bank v. Bank of Albany*, 1 Hill (N. Y.) 287; *Fuller v. Ryan & M.* 49. But see *Morrison v. Currie*, 4 Duer where it is held that the broker will be exonerated if he has paid over the money to his principal, before a demand for the note is made upon him.

⁴⁰² *Aldrich v. Jackson*, 5 R. I. 218; *Lyons v. Miller*, 6 Me. 427, 52 Am. Dec. 129; *Gurney v. Womersley*, 4 El. & Bl. 104.

⁴⁰³ *Fisher v. Rieman*, 12 Md. 497; *Ellis v. Wild*, 6 Mass. 427; *Ter v. Duren*, 29 Me. 434, 50 Am. Dec. 602.

⁴⁰⁴ *Baxter v. Duren*, 29 Me. 434, 50 Am. Dec. 602.

But the weight of authority is against any such distinction; and in a later Maine case Danforth, J., says: "From the weight of authority it would appear that the distinction noticed in * * * is, to say the least, somewhat shadowy, and that whether the plaintiff took the order as payment or as purchaser, the defendant must be held to some responsibility as to its validity; in short, that he, as seller, warrants the order to be what it purports, a genuine order; and whether the want of genuineness results from forgery or an absence of authority on the part of the drawers or acceptors, or, as in this case, both, must be immaterial."⁴⁰⁵ And again in a Massachusetts case it is said: "It is difficult to see any valid reason for such a distinction. Whether the purchaser pays cash or discharges a debt in payment, for the forged paper, the injury is the same to him. There is in both cases a failure of consideration growing out of a mistake of facts. The actual contract and the implied understanding as to the genuineness of the note is the same in both cases. And we think that the authorities which hold the seller to an implied warranty, in such case, that the note is genuine, are in conformity with the principles of sound reason and justice, and with the understanding of the parties in making such a contract."⁴⁰⁶

(c) **Representations and notice.**—The seller of a note is bound by representations of his broker to whom he gives it for sale, unless he limits his authority.⁴⁰⁷ So notice to a broker, while actually engaged in attempting to sell the note, is equivalent to notice to the vendor.⁴⁰⁸

796. **Exchange brokers.**

Exchange brokers are brokers who negotiate the purchase and sale of foreign bills of exchange.

See (10th Am. Ed.) 245, 246, where this distinction is recognized and stated to be the law.

⁴⁰⁵ *Hussey v. Sibley*, 66 Me. 192, 22 Am. Rep. 560.

⁴⁰⁶ *Chapman, J.*, in *Merriam v. Wolcott*, 3 Allen (Mass.) 258.

⁴⁰⁷ *Frevall v. Fitch*, 5 Whart. (Pa.) 325, 34 Am. Dec. 558; *Ahern v. Goodspeed*, 72 N. Y. 108.

⁴⁰⁸ *Brown v. Montgomery*, 20 N. Y. 287, 75 Am. Dec. 404.

§ 797. Merchandise brokers.

A merchandise broker is one who, as a business, sells goods, and negotiates between buyer and seller without having the custody of the property.⁴⁰⁹ The business of brokers is more nearly like factors than any other; it differs from them principally in that the merchandise broker does not have the possession of the goods sold by him as a factor has. There are many different or special classes of merchandise brokers, deriving their names from the commodities in which they deal. Thus, there are grain brokers, stock brokers, produce brokers and others. They are all included under the head of merchandise brokers; but each of the special classes has certain customs or usages, and characteristics that differ from the others; the differences between some, however, being very slight. A produce broker is one who negotiates the sales of produce of others without having its possession.⁴¹⁰ Under the Internal Revenue Act of 1866, it was held that a "broker" was one whose occupation is to sell agricultural produce in public market, and one is not exempt from the tax imposed by that Act by the fact that the produce is not purchased by him for sale, nor sold as agent for the owner but is raised by himself upon his farm.⁴¹¹

A merchandise broker's contract for commission is binding only if it provides that they should become due and payable when the goods are "shipped, accepted, and paid for," requiring that such conditions shall be fulfilled before there is a right to demand the commissions.⁴¹²

§ 798. Ship brokers.

A ship broker is one who, as a business, transacts business between the owners of ships and freighters and charterers; and negotiates the sale of vessels.⁴¹³ It is

⁴⁰⁹ See Black Law Dict. p. 156, tit. "Brokers"; Cyc. Law Dict. tit. "Brokers."

⁴¹⁰ *Braun v. Chicago*, 110 Ill. 188.

⁴¹¹ *United States v. Simons*, 1 Abb. (U. S.) 470, 7 Phila. Fed. Cas. No. 16,291.

⁴¹² *Hillman v. Joseph*, 9 Pa. Super. Ct. 1, 43 Wkly. Not.

⁴¹³ See Black Law Dict. p. 156, tit. "Brokers"; Pott v. Bing. 702; Cyc. Law Dict. tit. "Brokers."

ship broker's business to make any contracts that may be required of him in reference to the purchase, construction, sale, and running of ships or vessels, such as procuring a vessel to carry certain goods, or soliciting goods to be carried in a certain vessel; and where he has brought parties together, and the meeting has resulted in a contract, he is entitled to his commissions, although the contractor is required to enter into competition with other bidders before the contract is awarded to him.⁴¹⁴ And if he has negotiated a charter party, he will be entitled to his commissions, although the vessel is lost during the voyage.⁴¹⁵ But brokers employed to negotiate contracts incidental to commerce carried on by vessels navigating the seas are not entitled to a lien upon the vessels for their commissions.⁴¹⁶ An agreement to pay a ship broker a certain commission for obtaining a charter of a vessel from the United States government is not void on the ground that it contravenes public policy.⁴¹⁷

§ 799. Real estate brokers.

A real estate broker is one who, as a business, procures the purchase or sale of lands, acting as middleman or negotiator between vendor and purchaser to bring them together and arrange the terms; and who negotiates loans on real estate security, manages and leases estates, etc.⁴¹⁸ This subject has been treated heretofore, especially under the head of broker's right to commission, as most of the cases in this class have arisen out of disputes on that subject. By, perhaps, a majority of the cases, a real-estate broker who has authority to sell on fixed terms may bind his principal by a written contract to sell,⁴¹⁹ although some authorities

⁴¹⁴ *Holmes v. Neafie*, 151 Pa. 392.

⁴¹⁵ *Hagar v. Donaldson*, 154 Pa. 242. But see *Holmes v. Montauk Steamboat Co.*, 93 Fed. 731; *White v. Turnbull*, 78 Law T. (N. S.) 26.

⁴¹⁶ *The Retriever*, 93 Fed. 480.

⁴¹⁷ *Howland v. Coffin*, 47 Barb. (N. Y.) 653.

⁴¹⁸ See Cyc. Law Dict. tit. "Brokers"; Black's Law Dict. p. 156, t. "Brokers"; *Braun v. Chicago*, 110 Ill. 188; *Little Rock v. Barton*, 33 Ark. 436; *Halsey v. Monteiro*, 92 Va. 581.

⁴¹⁹ *Glentworth v. Luther*, 21 Barb. (N. Y.) 145; *Pringle v. Spaul-*

deny that he has such authority.⁴²⁰ But he cannot convey unless he is specially authorized by his principal to do so.⁴²¹ Nor has he implied authority to fix the time of sale, time of possession, nor the covenants to be included in the deed, nor can he materially change the terms fixed by his principal, without his consent.⁴²²

§ 800. Pawnbrokers.

A pawnbroker is one whose business it is to loan money on goods deposited with him in pledge, charging interest therefor.⁴²³ Strictly speaking, a pawnbroker is not a broker at all, not falling within any of the definitions of broker.⁴²⁴ The pawnbroker's business is generally regulated by statute. Under such statutes a borrower who has contracted to pay a higher rate to a pawnbroker than the law covers possession of the thing pawned upon a ten-day loan, with interest at the highest rate which the p

ding, 53 Barb. (N. Y.) 17; *Force v. Dutcher*, 18 N. J. Eq. 401; *v. Lindley* (N. J. Eq.) 30 Atl. 1063; *Smith v. Allen*, 8 N. J. Eq. 401; *Smith v. Armstrong*, 24 Wis. 446. But see *Roach v. C. Smith* (N. Y.) 175. As to authority not sufficient to authorize a broker to sell, see *Furst v. Tweed*, 93 Iowa, 300; *Berry v. Furst*, 93 Iowa, 296.

⁴²⁰ *Rutenberg v. Main*, 47 Cal. 213; *Campbell v. Gaillard*, 47 Cal. 440. Unless authority to do so plainly appears. *Dutcher v. Force*, 40 Cal. 240, 6 Am. Rep. 617. Or in the absence of authority, *Ballou v. Bergvendsen*, 9 N. D. 285. He has authority to bind his principal by signing a contract of sale. *Seay v. Monteiro*, 92 Va. 581; *Morris v. Ruddy*, 20 N. J. Eq. 401; *Coleman v. Garrigues*, 18 Barb. (N. Y.) 60. Mere authority to sell real estate does not carry with it implied authority to make a contract of sale, upon the owner's terms, that will bind his principal. *Hildreth v. Hildreth*, 2 App. D. C. 259.

⁴²¹ *Glentworth v. Luther*, 21 Barb. (N. Y.) 145; *Force v. Dutcher*, 18 N. J. Eq. 401.

⁴²² *Halsey v. Monteiro*, 92 Va. 581.

⁴²³ In 14 U. S. Stats, 116, a pawnbroker is defined as "a person whose business or occupation it is to take or receive money on pledge, pawn, or exchange, any goods, wares, or merchandise, or any kind of personal property whatever, as security for the payment of money lent them." See Cyc. Law Dict., tit. 116.

⁴²⁴ *Little Rock v. Barton*, 33 Ark. 436, 450.

is allowed to charge.⁴²⁵ And, of course, upon a sale by the pawnbroker he is entitled to retain interest only at the highest rate allowed by the statute. A pawnbroker is liable only for ordinary diligence; and where his place of business is broken into and articles pledged are taken therefrom he is not liable, if he exercised ordinary diligence to prevent the same.⁴²⁶

§ 801. Insurance brokers.

(a) In general.—An insurance broker is one who, as a business, procures insurance for those who employ him, and negotiates between the party seeking insurance and the insurance companies or their agents.⁴²⁷ An insurance broker must be distinguished from an ordinary insurance agent. The former is usually employed by one to effect insurance on his property. Whereas the latter is employed by the insurance company to solicit insurance for it. The insurance broker is generally the agent of the insured; the insurance agent is the agent of the insurance company.⁴²⁸ An insurance broker is one who acts as a middleman between the assured and the company, and who solicits insurance from the public under no employment from any special com-

⁴²⁵ Jackson v. Shawl, 29 Cal. 267.

⁴²⁶ Abbett v. Frederick, 56 How. Pr. (N. Y.) 68.

⁴²⁷ See Cyc. Law Dict. tit. "Brokers"; Black's Law Dict. p. 156, tit. "Brokers"; Bernheimer v. Leadville, 14 Colo. 523.

By the Massachusetts statute an insurance broker is defined to be any one who, "for compensation, acts or aids in any manner in negotiating contracts of insurance or reinsurance for a person other than himself, and not being the appointed agent or officer of the company in which such insurance or reinsurance is effected." Stat. 1887, c. 214, § 93, Rev. Laws Mass. 1902, p. 1162, § 92. Under such statute, one negotiating insurance in domestic companies, but not licensed under the statute as an agent or broker, who furnished to a duly licensed agent the names of persons desiring insurance, for the purpose of aiding such agent to effect such insurance, in consideration of a stipulated share in the commission, by means of which information such agent was enabled to effect such insurance, is an insurance broker. Pratt v. Burden, 168 Mass. 596. See Elliott, Ins. § 157.

⁴²⁸ Hartford Fire Ins. Co. v. Reynolds, 36 Mich. 502. See, also, Leutonia Ins. Co. v. Ewing, 90 Fed. 217.

pany, but having secured an order, he either procures insurance with a company selected by the assured in the absence of any selection by him, with a company selected by such broker.⁴²⁹ If he enters into the exclusive employment of the insurer or his agent, he loses his character as an insurance broker, and becomes a mere clerk, and any notice which could be given to a clerk cannot be given to him;⁴³⁰ though notice to an order broker is not notice to the insurer.⁴³¹

(b) **Insurance agents.**—An insurance agent during employment has a fixed relation to the company he represents. He owes duty and allegiance to the company employed, and acts only for such company in soliciting policies for it.⁴³² An agent, who is thus appointed to solicit business for the insurers, is usually held to be the agent of the company; and all acts done by him within the scope of his general authority is binding on the company, although in violation of a limitation upon the authority, not brought home to the knowledge of the party dealing with such agent.⁴³³ And he may waive any con-

⁴²⁹ *Arff v. Star F. Ins. Co.*, 125 N. Y. 57, 21 Am. Ins. L. J. 101; *Sellers v. Commercial F. Ins. Co.*, 105 Ala. 291; *Tanenbaum v. Manhattan F. Ins. Co.*, 44 App. Div. (N. Y.) 431.

⁴³⁰ *Arff v. Star F. Ins. Co.*, 125 N. Y. 57, 21 Am. St. L. J. 101.

⁴³¹ *Arff v. Star F. Ins. Co.*, 125 N. Y. 57, 21 Am. Ins. L. J. 101; *Mellen v. Hamilton F. Ins. Co.*, 17 N. Y. 609; *Devens v. Boston F. Ins. Co.*, 83 N. Y. 168; *United Firemen's Ins. Co. v. Thomas*, 92 Fed. 127; *Mannheim Ins. Co. v. Hollander*, 549.

⁴³² *McKinney v. Alton*, 41 Ill. App. 512; *East St. Louis F. Ins. Co. v. Mollen*, 59 Ill. App. 608; *Bernheimer v. Leadville*, 14 Colo. 518; *Rocky Mountain Assur. Co. v. Cooper*, 26 Colo. 452; *Ramspeck v. Georgia F. Ins. Co.*, 772; *Gude v. Exchange F. Ins. Co.*, 53 Minn. 222; *Com. Mut. F. Ins. Co. v. Fairbank Canning Co.*, 173 Mass.

⁴³³ *Miller v. Phoenix Ins. Co.*, 27 Iowa, 203, 1 Am. R. 101; *nan v. Missouri St. Mut. Ins. Co.*, 12 Iowa, 131; *Davenport v. M. & F. Ins. Co.*, 17 Iowa, 276; *Murphy v. Royal Ins. Co.*, 11 Ann. 775; *North Berwick Co. v. New England F. & M. Ins. Co.*, 52 Me. 336; *Burdick v. Security L. Ass'n*, 77 Mo. App. 101; *Giles v. American Cent. Ins. Co.*, 114 N. Y. 415, 11 Am. Ins. L. J. 101; *Post v. Aetna Ins. Co.*, 43 Barb. (N. Y.) 351; *Sheldrake v. F. & M. Ins. Co.*, 26 N. Y. 460, 84 Am. Dec. 213; *Kendrick v. F. & M. Ins. Co.*, 26 N. Y. 460, 84 Am. Dec. 213.

forfeitures in a policy, essential only to the contract of insurance, although contrary to a provision therein contained.⁴³⁴ So a general agent may waive the prepayment of the premium, even where the policy recites that it shall not be binding until the cash portion of the premium is actually paid in money;⁴³⁵ but the agent must be one who has author-

en. L. Ins. Co., 124 N. C. 315; Croft v. Hanover F. Ins. Co., 40 W. Va. 508, 52 Am. St. Rep. 902; Warner v. Peoria M. & F. Ins. Co., 14 Wis. 318, 323.

⁴³⁴ Piedmont & A. L. Ins. Co. v. Young, 58 Ala. 476, 29 Am. Rep. 70; Pierce v. German Sav. & Loan Soc., 72 Cal. 180, 1 Am. St. Rep. 5; Carrugi v. Atlantic F. Ins. Co., 40 Ga. 135, 2 Am. Rep. 567; Commercial Ins. Co. v. Spankneble, 52 Ill. 53, 4 Am. Rep. 582; Viele v. Germania Ins. Co., 26 Iowa, 9, 96 Am. Dec. 83; Mudd v. German Ins. Co., 22 Ky. L. R. 308, 56 S. W. 977; Pino v. Merchants' M. Ins. Co., 19 La. Ann. 214, 92 Am. Dec. 529; Mutual F. Ins. Co. v. Eicholtz, 3 Md. 92; Rokes v. Amazon Ins. Co., 51 Md. 512, 34 Am. Rep. 323; Little v. Phoenix Ins. Co., 123 Mass. 380, 25 Am. Rep. 96; Combs v. Hannibal Sav. & Ins. Co., 43 Mo. 148, 97 Am. Dec. 383; Springfield Steam Laundry Co. v. Traders' Ins. Co., 151 Mo. 90; Home F. Ins. Co. v. Kuhlman, 58 Neb. 488; Carson v. Jersey City F. Ins. Co., 43 N. J. Law, 300, 39 Am. Rep. 584; Whited v. Germania F. Ins. Co., 3 N. Y. 415, 32 Am. Rep. 330; Boehen v. Williamsburg City Ins. Co., 35 N. Y. 131, 90 Am. Dec. 787; Sheldon v. Atlantic F. & M. Ins. Co., 26 N. Y. 460, 84 Am. Dec. 213; Richmond v. Niagara F. Ins. Co., 79 N. Y. 237; McCabe v. Aetna Ins. Co., 9 N. D. 19; Ohio Farmers' Ins. Co. v. Burget, 17 Ohio Circ. R. 619; Murphy v. Southern L. Ins. Co., 3 Baxt. (Tenn.) 440, 27 Am. Rep. 761; Stolle v. Aetna F. & M. Ins. Co., 10 W. Va. 546, 27 Am. Rep. 593; Keeler v. Niagara F. Ins. Co., 16 Wis. 523, 84 Am. Dec. 714; May v. Buckeye Ins. Co., 25 Wis. 291, 3 Am. Rep. 76; Gans v. St. Paul F. & M. Ins. Co., 43 Wis. 108, 28 Am. Rep. 535.

⁴³⁵ Miller v. Life Ins. Co., 12 Wall. (U. S.) 303; Triple Link Mut. Indemnity Ass'n v. Williams, 121 Ala. 138; Knarston v. Manhattan Ins. Co., 124 Cal. 74; Sheldon v. Connecticut M. Ins. Co., 25 Conn. 207, 65 Am. Dec. 565; Young v. Hartford F. Ins. Co., 45 Iowa, 77, 24 Am. Rep. 784; Mississippi Valley L. Ins. Co. v. Neyland, 9 Bush (Ky.) 430; Washington L. Ins. Co. v. Menefee's Ex'r, 21 Ky. R. 916, 53 S. W. 260; Hartford L. & A. Ins. Co. v. Hayden's Adm'r, 90 Ky. 39; White v. Connecticut F. Ins. Co., 120 Mass. 330; Sims v. State Ins. Co., 47 Mo. 54, 4 Am. Rep. 311; Bodine v. Exchange F. Ins. Co., 51 N. Y. 117, 10 Am. Rep. 566; Sheldon v. Atlantic F. & M. Ins. Co., 26 N. Y. 460, 84 Am. Dec. 213; Boehen v. Williamsburg City Ins. Co., 35 N. Y. 133, 90 Am. Dec. 787; Walsh

ity to issue policies, as an agent merely authorized to receive applications and collect and remit premiums, has no power to extend time of payment.⁴³⁶ So not by notice of knowledge by, such an agent, of facts constituting a forfeiture, is such notice to, and knowledge by, the insurer, as may estop the latter from insisting on such forfeiture. Such an agent may also consent to prior or subsequent insurance on the same property.⁴³⁸ If in writing an application for insurance, the facts concerning the loss are correctly stated by the applicant to the agent, and the agent erroneously inserts them, the insurer, and not the agent, would be chargeable with the mistake.⁴³⁹

v. Hartford F. Ins. Co., 73 N. Y. 11; Dayton Ins. Co. v. Ohio St. 345, 15 Am. Rep. 612; Lebanon Mut. Ins. Co. v. 113 Pa. 591, 57 Am. Rep. 511; Fraser v. Home L. Ins. Co., 482; Wooddy v. Old Dominion Ins. Co., 31 Grat. (Va.) 482; Rep. 732; Jolliffe v. Madison M. Ins. Co., 39 Wis. 111, 20 Am. Rep. 732.

⁴³⁶ Critchett v. American Ins. Co., 53 Iowa, 404, 36 Am. Rep. 436.

⁴³⁷ Palatine Ins. Co. v. McElroy, 100 Fed. 391; North v. Co. v. Grand View Bldg. Ass'n, 101 Fed. 77; German Ins. Co. v. Wingfield, 22 Ky. L. R. 455, 57 S. W. 456; Teutonic Ins. Co. v. Howell, 21 Ky. L. R. 1245, 54 S. W. 852; London & Lancashire Ins. Co. v. Gerteisen, 21 Ky. L. R. 471, 51 S. W. 617; Bigelow v. F. Ins. Co., 94 Me. 39; Aetna Live Stock, F. & T. Ins. Co. v.stead, 21 Mich. 246, 4 Am. Rep. 483; Power v. Monitor Ins. Co., Mich. 364; Rickey v. German Guarantee Town M. F. Ins. Co., Mo. App. 485; Chamberlain v. British American Assurance Co., App. 589; Hackett v. Philadelphia Underwriters, 79 Pa. 483; Pratt v. New York Cent. Ins. Co., 55 N. Y. 505, 14 Am. Rep. 483; Clapp v. Farmers' M. F. Ins. Ass'n, 126 N. C. 388; American Ins. Co. v. Wall, 31 Ohio St. 628, 27 Am. Rep. 533; Norris v. Ins. Co., 57 S. C. 358; American Cent. Ins. Co. v. M. F. Ins. Co. (Tenn.) 513, 41 Am. Rep. 647; Carrigan v. Lycoming Ins. Co., 53 Vt. 418, 38 Am. Rep. 687; Manhattan F. Ins. Co. v. Grat. (Va.) 389, 26 Am. Rep. 364; May v. Buckeye Mut. Ins. Co., Wis. 291, 3 Am. Rep. 76; Gans v. St. Paul F. & M. Ins. Co., 108, 28 Am. Rep. 535.

⁴³⁸ Kitchen v. Hartford F. Ins. Co., 57 Mich. 135, 344; Carrugi v. Atlantic F. Ins. Co., 40 Ga. 135, 2 Am. Rep. 438.

⁴³⁹ American L. Ins. Co. v. Mahone, 21 Wall. (U. S.) 222; N. Y. Mut. Ins. Co. v. Wilkinson, 13 Wall. (U. S.) 222; N. Y. L. Ins. Co. v. Baker, 94 U. S. 610; Continental L. Ins. Co. v. Chamberlain, 132 U. S. 304; Southern Ins. Co. v. Hastings, 132 U. S. 304.

There are in many forms of applications or policies, a provision stating that such agent is the agent of the insured and not of the company; but "there is no magic in mere words to change the real into the unreal. A device of words cannot be imposed upon a court in place of an actuality of facts," and such a provision, if not in fact true, cannot make him the agent of the insured, and imports nothing more than that the person obtaining the insurance was to be deemed the agent of the insured in matters immediately connected with the procurement of the policy.⁴⁴⁰

Mutual Reserve Fund Life Ass'n v. Farmer, 65 Ark. 581; *La Marche v. New York L. Ins. Co.*, 126 Cal. 498; *Malleable Iron Works v. Phoenix Ins. Co.*, 25 Conn. 465; *Hough v. City F. Ins. Co.*, 29 Conn. 10; *Lycoming F. Ins. Co. v. Jackson*, 83 Ill. 302, 25 Am. Rep. 386; *Commercial Ins. Co. v. Spankneble*, 52 Ill. 53, 4 Am. Rep. 582; *Loyal Neighbors v. Boman*, 75 Ill. App. 566, 177 Ill. 27; *Tarpey v. Security Trust Co.*, 80 Ill. App. 378; *Metropolitan L. Ins. Co. v. Carson*, 85 Ill. App. 143; *Bowlus v. Phenix Ins. Co.*, 133 Ind. 106; *Donnelly v. Cedar Rapids Ins. Co.*, 70 Iowa, 693; *Fitchner v. Fidelity M. F. Ins. Ass'n*, 103 Iowa, 276; *Dryer v. Security F. Ins. Co. (Iowa)* 82 N. W. 494; *Van Houten v. Metropolitan Ins. Co.*, 110 Mich. 682; *Kausal v. Minnesota Farmers' M. F. Ins. Ass'n*, 31 Minn. 17, 47 Am. Rep. 776; *Brandup v. St. Paul F. & M. Ins. Co.*, 27 Minn. 393; *Planters' Ins. Co. v. Myers*, 55 Miss. 479, 30 Am. Rep. 521; *Montgomery v. Lebanon Town M. F. Ins. Co.*, 80 Mo. App. 100; *German Ins. Co. v. Frederick*, 57 Neb. 538; *Rowley v. Empire Ins. Co.*, 36 N. Y. 550; *Flynn v. Equitable L. Ins. Co.*, 78 N. Y. 577, 4 Am. Rep. 561; *O'Brien v. Home Ben. Soc.*, 117 N. Y. 310; *Massachusetts L. Ins. Co. v. Eshelman*, 30 Ohio St. 647; *Farmers' Ins. Co. v. Williams*, 39 Ohio St. 584, 48 Am. Rep. 474; *Planters' Ins. Co. v. Corrells*, 1 Baxt. (Tenn.) 352, 25 Am. Rep. 780; *Farmers' & Mechanics' Benev. F. Ins. Ass'n v. Williams*, 95 Va. 248; *Miner v. Phoenix Ins. Co.*, 27 Wis. 693, 9 Am. Rep. 479. Compare *Blooming Grove M. F. Ins. Co. v. McAnerney*, 102 Pa. 335, 48 Am. Rep. 209; *Commonwealth M. F. Ins. Co. v. Huntzinger*, 98 Pa. 41.

⁴⁴⁰ *Grace v. American Cent. Ins. Co.*, 109 U. S. 278; *Kehler v. New Orleans Ins. Co.*, 23 Fed. 709; *Adams v. Manufacturers' & B. F. Ins. Co.*, 17 Fed. 630; *Commercial Ins. Co. v. Ives*, 56 Ill. 402; *Lumbermen's M. Ins. Co. v. Bell*, 166 Ill. 400; *Royal Neighbors v. Boman*, 177 Ill. 27; *Indiana Ins. Co. v. Hartwell*, 100 Ind. 566; *White v. Connecticut F. Ins. Co.*, 120 Mass. 330; *Kausal v. Minnesota Farmers' M. F. Ins. Ass'n*, 31 Minn. 17, 47 Am. Rep. 776; *Planters' Ins. Co. v. Myers*, 55 Miss. 479, 30 Am. Rep. 521; *Clark v. Union M. F. Ins. Co.*, 40 N. H. 333, 77 Am. Dec. 721; *Herman v.*

(c) **Insurance brokers are agents of the insured.**—
 ance broker is ordinarily the agent of the insured,⁴⁴²
 of the insurance company.⁴⁴² Generally he is
 agent, and his authority ceases as soon as he has
 the policy,⁴⁴³ unless he is employed as a general
 place and manage the insurance on his principal's
 erty.⁴⁴⁴ Thus, where a broker is originally employed

Niagara F. Ins. Co., 100 N. Y. 411, 53 Am. Rep. 197; *Corn*
Paul F. & M. Ins. Co., 43 Wis. 108, 28 Am. Rep. 535. *Corn*
bard v. Mut. Reserve Fund L. Ass'n, 80 Fed. 681; *Rohrbach*
mania F. Ins. Co., 62 N. Y. 47, 20 Am. Rep. 451.

⁴⁴¹ *Franklin Ins. Co. v. Sears*, 21 Fed. 290; *Hamblet v.*
Co., 36 Fed. 118; *Sellers v. Commercial F. Ins. Co.*, 108
Young v. Newark F. Ins. Co., 59 Conn. 41; *East St. Louis*
ner, 59 Ill. App. 608; *McKinney v. Alton*, 41 Ill. App. 50
M. Ins. Co. v. Mette, 27 Ill. App. 330; *American F. Ins. Co.*
83 Md. 22; *Westfield Cigar Co. v. Insurance Co. of North*
169 Mass. 382; *Commonwealth M. F. Ins. Co. v. William K.*
Mfg. Co., 171 Mass. 265; *Hartford F. Ins. Co. v. Reynolds*
502; *Gude v. Exchange F. Ins. Co.*, 53 Minn. 220; *Lange*
ing F. Ins. Co., 3 Mo. App. 591; *Allen v. German American*
123 N. Y. 6; *Arff v. Star F. Ins. Co.*, 125 N. Y. 57, 21 Am.
721; *Pottsville M. F. Ins. Co. v. Minnequa Springs Imp. Co.*
137; *Fromherz v. Yankton F. Ins. Co.*, 7 S. D. 187; *East*
Ins. Co. v. Brown, 82 Tex. 636; *East Tex. F. Ins. Co. v.*
Tex. 653; *John R. Davis Lumber Co. v. Hartford F. Ins. Co.*
226.

⁴⁴² *Ben Franklin Ins. Co. v. Weary*, 4 Ill. App. 74; *Kilgus*
F. Ins. Co. v. Swigert, 11 Ill. App. 590; *East St. Louis v. M.*
Ill. App. 608; *Security Ins. Co. v. Mette*, 27 Ill. App. 324
Lycoming F. Ins. Co., 3 Mo. App. 591; *Allen v. German*
Ins. Co., 123 N. Y. 6; *Arff v. Star F. Ins. Co.*, 125 N. Y.
St. Rep. 721.

⁴⁴³ *Grace v. American Cent. Ins. Co.*, 109 U. S. 278;
Manufacturers' & B. F. Ins. Co., 17 Fed. 630; *Young v.*
Ins. Co., 59 Conn. 42; *Indiana Ins. Co. v. Hartwell*, 100
American F. Ins. Co. v. Brooks, 83 Md. 22; *Broadway*
F. Ins. Co., 34 Minn. 465; *Rothschild v. American Cent.*
Mo. 41, 41 Am. Rep. 303; *Hermann v. Niagara F. Ins. Co.*
Y. 411, 53 Am. Rep. 199; *Von Wein v. Scottish Union &*
Co., 52 N. Y. Super. Ct. 490; *Sun Fire Office v. Ermentrout*
Co. Ct. R. 21; *East Tex. F. Ins. Co. v. Blum*, 76 Tex. 65
Davis Lumber Co. v. Hartford F. Ins. Co., 95 Wis. 220
Hartford F. Ins. Co., 63 Wis. 157.

⁴⁴⁴ *Hermann v. Niagara F. Ins. Co.*, 100 N. Y. 411, 53
199; *Standard Oil Co. v. Triumph Ins. Co.*, 64 N. Y. 85.

to obtain a policy of insurance and is not afterwards directed by the assured to obtain a renewal, and a renewal receipt is sent to the broker by the insurer who intends that he shall deliver the same and collect the premium, payment to the broker is payment to the company, and the validity of the insurance is not affected by the fact that the broker fails to remit the premium to the company.⁴⁴⁵ Notice given to such broker after the policy had been procured would not be notice to the insured,⁴⁴⁶ unless he is employed as a general agent, and his authority continues after the policy has been issued,⁴⁴⁷ and this rule cannot be changed or altered by a provision in the policy or by a usage among insurance men.⁴⁴⁸ Nor has he authority thereafter to return a policy for cancellation or substitute another in its stead.⁴⁴⁹ So an insurance broker is the agent of the insured and not of the company, when he receives from the insured an applica-

⁴⁴⁵ *American F. Ins. Co. v. Brooks*, 83 Md. 22.

⁴⁴⁶ *Grace v. American Cent. Ins. Co.*, 109 U. S. 278; *Kehler v. New Orleans Ins. Co.*, 23 Fed. 709; *Adams v. Manufacturers' & B. F. Ins. Co.*, 17 Fed. 630; *White v. Insurance Co. of N. Y.*, 93 Fed. 161; *Wilson v. Hartford F. Ins. Co.*, 17 App. D. C. 14; *Indiana Ins. Co. v. Hartwell*, 100 Ind. 566; *White v. Connecticut F. Ins. Co.*, 120 Mass. 330; *Broadwater v. Lion F. Ins. Co.*, 34 Minn. 465; *Rothschild v. American Cent. Ins. Co.*, 74 Mo. 41, 41 Am. Rep. 303; *Hermann v. Niagara F. Ins. Co.*, 100 N. Y. 411, 53 Am. Rep. 197; *Body v. Hartford F. Ins. Co.*, 63 Wis. 157.

⁴⁴⁷ *Hermann v. Niagara F. Ins. Co.*, 100 N. Y. 411, 53 Am. Rep. 199; *Standard Oil Co. v. Triumph Ins. Co.*, 64 N. Y. 85.

⁴⁴⁸ *Grace v. American Cent. Ins. Co.*, 109 U. S. 278; *Adams v. Manufacturers' & B. F. Ins. Co.*, 17 Fed. 630; *Franklin Ins. Co. v. Sears*, 21 Fed. 290; *Sullivan v. Phenix Ins. Co.*, 34 Kan. 170; *White v. Connecticut F. Ins. Co.*, 120 Mass. 330; *Planters' Ins. Co. v. Myers*, 55 Miss. 479, 30 Am. Rep. 521; *Hermann v. Niagara F. Ins. Co.*, 100 N. Y. 411, 53 Am. Rep. 197; *Von Wein v. Scottish Union & Nat. Ins. Co.*, 52 N. Y. Super. Ct. 490; *Eilenberger v. Protective M. F. Ins. Co.*, 89 Pa. 464; *Gans v. St. Paul F. & M. Ins. Co.*, 43 Wis. 108, 28 Am. Rep. 535.

⁴⁴⁹ *Rothschild v. American Cent. Ins. Co.*, 5 Mo. App. 596; *Latoix v. Germania Ins. Co.*, 27 La. Ann. 113; *Van Valkenburgh v. Lenox F. Ins. Co.*, 51 N. Y. 465; or to receive notice of cancellation of policies, *White v. Insurance Co. of N. Y.*, 93 Fed. 161; *Merchants' Ins. Co. v. Shults*, 8 Kan. App. 798. See, also, *Belt v. American Cent. Ins. Co.*, 29 App. Div. (N. Y.) 546.

tion for a change in the policy, and undertakes such change.⁴⁵⁰ An agent that insures a person company, and acts as broker in procuring insurance for a person in other companies, is the agent of such person as to such other companies.⁴⁵¹

An insurance broker may, however, be the agent of a company also for certain purposes. Thus, he may be the agent of the company for the purpose of delivering the policy and collecting the premium.⁴⁵² But he is not the insured credit for such premiums,⁴⁵³ unless he had been in the habit of giving the broker credit. In the case of other agents, all acts and representations of an insurance broker within the scope of his authority are binding upon his principal.⁴⁵⁵

⁴⁵⁰ *Duluth Nat. Bank v. Knoxville F. Ins. Co.*, 85 *Tenn. St. Rep.* 744.

⁴⁵¹ *Westfield Cigar Co. v. Insurance Co. of North America*, 382 *Mass.* See, also, *British America Assur. Co. v. Colo.* 452.

⁴⁵² *Duluth Nat. Bank v. Knoxville F. Ins. Co.*, 85 *Tenn. St. Rep.* 744; *Sun M. Ins. Co. v. Saginaw Barrel Co.*, 123 *Ind.* 178; *Mayo v. Peoria Ind. Ins. Co.*, 123 *Ind.* 178; *Mayo v. Peoria Ind. Ins. Co.*, 111 *Mass.* 537; *Monitor M. F. Ins. Co. v. Young*, 111 *Mass.* 537; *Ins. Co. v. Reynolds*, 36 *Mich.* 502; *Gude v. Exchange Ins. Co.*, 53 *Minn.* 220; *Davis v. Aetna M. F. Ins. Co.*, 67 *N. H.* 39; *Union M. L. Ins. Co.*, 80 *N. Y.* 39; *Crousillat v. Ball*, 3 375; *East Tex. F. Ins. Co. v. Brown*, 82 *Tex.* 636; *Ins. Co. v. Blum*, 76 *Tex.* 653. But see *Gentry v. Conn. Ins. Co.*, 15 *Mo. App.* 215; *Pottsville M. F. Ins. Co. v. Springs Imp. Co.*, 100 *Pa.* 137.

⁴⁵³ *Hambleton v. Home Ins. Co.*, 6 *Biss.* 91, *Fed. Cas.* 393; *Marland v. Royal Ins. Co.*, 71 *Pa.* 393.

⁴⁵⁴ *White v. Connecticut F. Ins. Co.*, 120 *Mass.* 330; *Marland Purchase Ins. Co.*, 62 *N. Y.* 598; *Bang v. Farmington Banking Co.*, 1 *Hughes*, 290, *Fed. Cas. No.* 838.

⁴⁵⁵ *Hambleton v. City Ins. Co.*, 36 *Fed.* 122; *Sellers v. F. Ins. Co.*, 105 *Ala.* 282; *Milliken v. Woodward*, 64 *N. Y.* 85; *Standard Oil Co. v. Triumph Ins. Co.*, 64 *N. Y.* 85; *Ikeford F. Ins. Co.*, 24 *Misc. (N. Y.)* 136; *Belt v. American Ins. Co.*, 29 *App. Div. (N. Y.)* 546; *Manhattan F. Ins. Co. v. River L. & W. Co.*, 26 *Misc. (N. Y.)* 394; *Fromherz v. Ins. Co.*, 7 *S. D.* 187; *John R. Davis Lumber Co. v. Ins. Co.*, 95 *Wis.* 226.

(d) **Diligence and skill required of insurance brokers.**—An insurance broker, like other agents, is bound to use a reasonable degree of skill, care, and diligence in effecting proper and sufficient insurance for his employer in good and reliable companies;⁴⁵⁶ and if in so doing, he insures in a company that was of good standing at the time the insurance was effected, but subsequently fails, he will not be liable for a resulting loss.⁴⁵⁷ But he has no authority to insure his principal's property in a mutual company since he will thereby make his principal an insurer of others.⁴⁵⁸ If the broker is unable to place insurance according to the instructions of his client, it is his duty to seasonably notify his principal, though his duty to give such notice does not begin until he has had a reasonable time in which to find out, by the exercise of ordinary diligence, whether or not he can place the insurance.⁴⁵⁹ And in an action to recover damages for the alleged negligence of the broker, the presumption is that the broker did his duty, and he is not obliged to offer any evidence to show that he exercised ordinary care in the premises until the plaintiff has shown that he was negligent.⁴⁶⁰ So, as has been seen, where the policy is in the name of the broker, or it is payable to him, for the benefit of his principal, or another, he may bring an action on it in his own name,⁴⁶¹ subject, however, to the right of the principal to sue in his own name.⁴⁶² And if the principal

⁴⁵⁶ *Park v. Hammond*, 6 Taunt. 495; *Maydew v. Forrester*, 5 Taunt. 615; *Gettins v. Scudder*, 71 Ill. 86; *Criswell v. Riley*, 5 Ind. App. 496; *Milliken v. Woodward*, 64 N. J. Law, 444; *Shepard v. Davis*, 42 App. Div. (N. Y.) 462; *Veley v. Clinger*, 18 Pa. Super. Ct. 125.

⁴⁵⁷ *Gettins v. Scudder*, 71 Ill. 86; *Shepard v. Davis*, 42 App. Div. (N. Y.) 462.

⁴⁵⁸ *Annan v. Hill Union Brewery Co.*, 59 N. J. Eq. 414.

⁴⁵⁹ *Backus v. Ames*, 79 Minn. 145.

⁴⁶⁰ *Backus v. Ames*, 79 Minn. 145.

⁴⁶¹ *Ante*, § 794; *Jefferson Ins. Co. v. Cotheal*, 7 Wend. (N. Y.) 72, 22 Am. Dec. 567; *Farrow v. Commonwealth Ins. Co.*, 18 Pick. (Mass.) 53, 29 Am. Dec. 564; *Provincial Ins. Co. v. Leduc*, L. R. 6 P. C. 224.

⁴⁶² *Browning v. Provincial Ins. Co.*, L. R. 5 P. C. 263; *Sargent v. Morris*, 3 Barn. & Ald. 281; *Aldrich v. Equitable Safety Ins. Co.*, 1

had been disclosed, the company could not set off the principal's action, equities due to it by the broker. It would be otherwise if the broker had not disclosed the principal and was himself liable as principal; as in that case the insurer would have a right to set off against the principal's action any equities it had acquired against the broker before the principal was discovered.⁴⁶⁴

§ 802. Custom house brokers.

A custom house broker is defined as: "Every person whose occupation it is, as the agent of others, to receive duties, entries and other custom house papers, or transact business at any port of entry relating to the importation or exportation of goods, wares, or merchandise."⁴⁶⁵

§ 803. Stockbrokers—Definition and nature.

A stockbroker is one whose business it is to buy and sell shares of stock in incorporated companies, and the business of governments.⁴⁶⁶ The rules in reference to stockbrokers are, in many respects, likewise applicable to custom house brokers; but there are some special features about stockbrokers which will be briefly treated here, not referring to the discussion of those rules which have been treated here in this chapter. As a general rule, any person who makes a contract may be a stockbroker; but as to members

Woodb. & M. 276, Fed. Cas. No. 155; *Newson v. Douglas*, 10 Md. & J. (Md.) 417, 16 Am. Dec. 317; *Farrow v. Commonwealth Ins. Co.*, 18 Pick. (Mass.) 53, 29 Am. Dec. 564; *Somes v. Equitable Ins. Co.*, 12 Gray (Mass.) 532; *Williams v. Ocean Ins. Co.* (Mass.) 305.

⁴⁶³ *Sweeting v. Pearce*, 7 C. B. (N. S.) 449; *Braden v. State Ins. Co.*, 1 La. 220, 20 Am. Dec. 277; and the principle is not to be affected by a usage to the contrary of which has been given notice, *Scott v. Irving*, 1 Barn. & Adol. 605.

⁴⁶⁴ *Browning v. Provincial Ins. Co.*, L. R. 5 P. C. 263.

⁴⁶⁵ 14 Stat. 117.

⁴⁶⁶ See Cyc. Law Dict. tit. "Brokers"; *Bouvier Law Dictionary*. "Brokers." He has also been defined as "an agent who, in his own name, makes a contract on behalf of his principal for the purchase or sale of stocks, scrip, debentures, bonds, and securities, receiving a compensation in money therefor." *Stock Brok.* 3.

stock exchange, there are certain requisites to be complied with before he can act as such. A national bank, however, cannot act as a stockbroker.⁴⁶⁷

§ 804. Distinction between stockbroker and ordinary broker.

The distinctions between a stockbroker and an ordinary broker are summarized as follows: "In the first place, the stock dealer who is employed, though called a stockbroker, does not act as broker in this transaction. It is no part of the office or duty of a broker to pay the price. It is no part of the office or right of a broker to receive the property, still less to take the title in his own name. In this transaction he acts in a peculiar business, in his own name and on his own responsibility, protected against loss by the indemnity furnished, or by the agreement to be furnished to him. The idea of mere agency, ordinarily suggested by the name 'broker,' does not therefore arise out of the fact that the dealers in stocks for account of others, as to profit and loss, are called stockbrokers. In the next place the transaction, according to the intent and purpose of the employment of the broker, does not contemplate that the customer will ever receive the stock or own it. It may be, that if the broker desires to close his connection with the transaction, the customer, if he pays the cost, interest, and all commissions which the broker has earned or is entitled to earn, will receive the stock, whether he may so insist or not, is a collateral question; and if he be so entitled, it will nevertheless be true that this is not in pursuance of the arrangement but a departure from it, for the intent is that the stock shall be carried by the broker until directed to be sold, the customer never having title to the stock at all. And finally, in my opinion, the transaction is an executory agreement for a pure speculation in the rise and fall of stock, which the broker, on condition of perfect indemnity against loss, agrees to carry through in his own name and on his own means or credit, accounting to his customer for the profits, if any, and holding him responsible for the loss."⁴⁶⁸

⁴⁶⁷ First Nat. Bank of Allentown v. Hoch, 89 Pa. 324, 33 Am. Rep. 769; Weckler v. First Nat. Bank, 42 Md. 581, 20 Am. Rep. 95. See Williamson v. Mason, 12 Hun (N. Y.) 97.

⁴⁶⁸ By Woodruff, J., in his dissenting opinion in Markham v. Jau-

The chief distinction then is that whereas an broker does not have possession of the property on which he is conducting negotiations, yet a stockbroker, by the very nature of his business, may receive the property, chase, or, in case of a sale, may make delivery of the stock sold. And in transactions conducted on the stock exchange he deals, as regards third parties, as principal, his position seldom being known. In such transactions, he is recognized as an agent, but is bound on all contracts entered into by him as if he were in fact the principal. In the case of other brokers, we have seen that they must act in the name of their principal, and if it is necessary to sue or be sued, it must be done in the name of the principal.

§ 805. Regulation and nature of business.

The broker's business of buying and selling stocks and other securities in the United States is generally regulated by express agreement, or by the usages of the place where the stocks are bought and sold, and this business is generally restricted to those brokers who are members of the stock exchanges.

An ordinary transaction between a stockbroker and his client is so well described in a New York case that the language of the Chief Justice in that case may well be quoted here: "The customer employs the broker to buy or sell stocks for his account, and to pay for them, and to keep them subject to his order as to the time of sale. The customer advances ten per cent of their market value, and agrees to keep good such proportionate advance in case of fluctuations to the fluctuations of the market. The broker takes and agrees: 1. At once to buy for the customer the stock indicated; 2. To advance all the money required for the purchase beyond the ten per cent furnished by the customer; 3. To carry or hold such stocks for the benefit of the customer so long as the margin of ten per cent is kept, or until notice is given by either party that the transaction must be closed—an appreciation in the value of the

don, 41 N. Y. 235, 256. And see *Northrup v. Shook*, 10 B. Fed. Cas. No. 10,329.

the gain of the customer, and not of the broker; 4. At all times to have in his name or under his control, ready for delivery, the shares purchased, or an equal amount of other shares of the same stock; 5. To deliver such shares to the customer when required by him, upon the receipt of the advances and commissions accruing to the broker; or, 6. To sell such shares upon the order of the customer, upon payment of the like sums to him, and to account to the customer for the proceeds of such sale. Under this contract, the customer undertakes: 1. To pay a margin of ten per cent on the current market value of the shares; 2. To keep good such margin according to the fluctuations of the market; 3. To take the shares so purchased on his order whenever required by the broker, and to pay the difference between the percentage advanced by him and the amount paid therefor by the broker."⁴⁶⁹

This is usually known as buying or selling on margin. While the usual margin advanced is ten per cent of the market value of the stock, it is not essential that it should be that amount; it may be more, it may be less, or there may be no advancement at all, according to the confidence the broker has in the ability of the client to respond to ultimate loss. "But whether the broker advances all or only the principal portion of the sum invested in the securities, the relation of the parties is unchanged. The fact exists that the broker looks to the principal for an indemnity upon the entire transaction. The client having given the broker an order to buy or sell, either in writing or verbally, the next step in the transaction is that the broker goes into the stock exchange and executes the business, making a verbal contract therefor with another broker. Frequently the broker, upon receiving an order, deposes another or subordinate broker to do the business. This is contrary to the general principle of law that an agent cannot delegate his business to another; but it is justified by the general usage of Wall street, of which the client has express or implied knowledge."⁴⁷⁰

⁴⁶⁹ By Hunt, C. J., in *Markham v. Jaudon*, 41 N. Y. 239.

⁴⁷⁰ Dos Passos, *Stockbrokers, etc.*, p. 104.

§ 806. Relation between the parties in dealing

The relation existing between the customer and the broker in buying or selling on margins is that of pledgor and pledgee. The customer is the pledgor, the broker is the pledgee, and the stock is the subject of the pledge. The broker has all the responsibilities and advantages of the relation.⁴⁷¹ And if the customer deposits something else, as a margin instead of money, the relation of pledgor and pledgee would still exist.⁴⁷²

But the relation of pledgor and pledgee is not the same as the relation existing between the broker and his customer. In such transactions, there also exists the relation of principal and agent, and, in this view, the broker, as agent, is bound to obey the instructions of his customer.⁴⁷³ The time during the period the stock is held by the broker, if the customer orders it sold, the broker is bound to

⁴⁷¹ *Markham v. Jaudon*, 41 N. Y. 235; *Thompson v. Root*, 23 Am. St. Rep. 482; *Skiff v. Stoddard*, 63 Conn. 198; *Ins. Co. v. Dalrymple*, 25 Md. 242, 89 Am. Dec. 77; *Tenth Nat. Bank*, 46 N. Y. 325, 7 Am. Rep. 341; *Baker v. Drake*, 66 N. Y. 211, 13 Am. Rep. 507; *Baker v. Drake*, 66 N. Y. 211, 13 Am. Rep. 507; *Read v. Lambert*, 10 Abb. Pr. (N. S.; N. Y.) 80; *Read v. Lambert*, 10 Abb. Pr. (N. S.; N. Y.) 80; *Hart v. Gruman*, 58 N. Y. 425; *Gruman v. Smith*, 81 N. Y. 211. The doctrine has been denied on the ground that where there is no possession by the purchaser, and perhaps no consummation of the relation of pledgor and pledgee could not be created. *Drake*, 49 Barb. (N. Y.) 186; *Sterling v. Jaudon*, 48 N. Y. 459, but the later cases overrule this contention.

Under the law of Massachusetts, as established by *Drake*, a broker who has purchased stock on a margin for a customer is a pledgee thereof to secure his advances, but his contract is conditional, to deliver so many shares of the stock on payment of the remainder of the purchase price; and he may pledge the stock for his own debt, or even sell it, without being guilty of a breach of the contract, until a demand has been made by the customer and refused. *In re Swift*, 105 Fed. 493, 100 N. D. 1; *Covell v. Loud*, 135 Mass. 41, 46 Am. Rep. 46; *Wood v. Gray* (Mass.) 375.

⁴⁷² *Lawrence v. Maxwell*, 53 N. Y. 19; *Vaupell v. Sandf. Ch.* (N. Y.) 143.

⁴⁷³ *Zimmerman v. Hell*, 86 Hun, 114, 156 N. Y. 703.

⁴⁷⁴ *Allen v. McConihe*, 124 N. Y. 342; *Ryder v. Sisk* (N. Y.) 90; *Galigher v. Jones*, 129 U. S. 193.

The position of the broker is twofold. Upon the order of the customer, he purchases the shares of stock desired by him. This is a clear act of agency. To complete the purchase, he advances from his own funds, for the benefit of the customer, ninety per cent of the purchase money. Quite as clearly, he does not in this act as an agent, but assumes a new position. He also holds, or carries the stock for the benefit of the purchaser, until a sale is made by the order of the purchaser, or upon his own action. In thus holding or carrying, he stands upon a different ground from that of broker or agent, whose office is simply to buy and sell. To advance money for the purchase, and to hold and carry stocks, is not the act of a broker, as such. In so doing, he enters upon a new duty, obtains other rights, and is subject to additional responsibilities. The contract between the parties is in spirit and in effect, if not technically and in form, a contract of pledge. To authorize the brokers to sell the stock purchased, they are bound first to call upon the client to make good his margin; and, failing in that, he is entitled, secondly, to notice of the time and place where the stock would be sold; which time and place thirdly must be reasonable.⁴⁷⁵

§ 807. Customs and usages of stockbrokers.

In the absence of an express contract to the contrary, a client who employs a stockbroker to buy or sell stocks for him is presumed to authorize such broker to deal according to the customs of stockbrokers; and the latter has, in the execution of his orders, the implied authority to act according to the rules and usages on the stock exchange;⁴⁷⁶ unless

⁴⁷⁵ *Markham v. Jaudon*, 41 N. Y. 235, 240, 243.

⁴⁷⁶ *Hodgkinson v. Kelly*, L. R. 6 Eq. 501; *Cruse v. Paine*, 4 Ch. App. 443; *Pollock v. Stables*, 12 Q. B. 765; *Sutton v. Tatham*, 10 Adol. & E. 27; *Marten v. Gibbon*, 33 Law T. (N. S.) 561; *Skiff v. Stoddard*, 63 Conn. 199; *Corbett v. Underwood*, 83 Ill. 324, 25 Am. Rep. 392; *Rosenstock v. Tormey*, 32 Md. 169, 3 Am. Rep. 125; *Durant v. Burt*, 98 Mass. 161; *Van Dusen-Harrington Co. v. Jungeblut*, 55 Minn. 298, 74 Am. St. Rep. 463; *Whitehouse v. Moore*, 13 Abb. Pr. (N. Y.) 142; *Horton v. Morgan*, 19 N. Y. 170, 75 Am. Dec. 311; *Nourse v. Prime*, 7 Johns. Ch. (N. Y.) 69, 11 Am. Dec. 403; *Camron v. Durkheim*, 55 N. Y. 425; *Sumner v. Stewart*, 69 Pa. 321.

the custom or usage is immoral, unlawful, unreasonable, or contrary to the express agreement of the parties, or which would change the intrinsic character of the undertaking, this rule applies as well to dealings between the parties to themselves as between brokers and clients, for a broker would be presumed to know the usages of the business.⁴⁷⁸

It has been seen heretofore that as a general rule a principal can only be bound by a usage of which he has knowledge to have knowledge express or implied, and that if there is a well established, general, and reasonable one contrary to positive law or public policy, the client would be held to have constructive notice thereof. When, therefore, a client employs a broker to transact business on the stock-exchange, he is presumed to have knowledge of the usages thereof that meet the above requirements, and to authorize the broker to deal according to such usages, even if the client is ignorant of such rules or usages, and to avail himself of his ignorance, against the broker.

§ 808. Right to contract in his own name.

Contrary to the usual rule in reference to brokers and stockbrokers in transactions with other stockbrokers and brokers in their own names, the names of their principals are being concealed. The brokers themselves are the

⁴⁷⁷ *Skiff v. Stoddard*, 63 Conn. 199; *Pearson v. Scott*, 100 (N. S.) 747; *Robinson v. Mollett*, 44 Law J. C. P. 362; *Pearce*, 7 C. B. (N. S.) 449; *Langton v. Walte*, L. R. 10 Q. B. 439; *Magee v. Atkinson*, 2 Mees. & W. 439; *Vermilye v. Adams*, 21 Wall. (U. S.) 138; *Pickering v. Demerritt*, 100 Mass. 306; *Holmes*, 103 Mass. 306; *Harris v. Tumbidge*, 83 N. Y. Am. Rep. 398; *Lawrence v. Maxwell*, 53 N. Y. 19; *Jaudon*, 41 N. Y. 235; *Dykers v. Allen*, 7 Hill (N. Y.) 69; *Evans v. Waln*, 71 Pa. 69.

⁴⁷⁸ *Durant v. Burt*, 98 Mass. 161; *Hoffman v. Livingston*, 10 Super. Ct. 552; *Colket v. Ellis*, 10 Phila. (Pa.) 375; *Speyers*, 56 N. Y. 230.

⁴⁷⁹ *Van Dusen-Harrington Co. v. Jungeblut*, 75 Minn. 308; *St. Rep.* 463; *Mitchell v. Newhall*, 15 Mees. & W. 308; *Stables*, 12 Q. B. 765; *Taylor v. Bayley*, 169 Ill. 181; *Moore*, 13 Abb. Pr. (N. Y.) 142.

and each looks to the other contracting broker to carry out the transaction, and even if the principal should become known the practice is not to enforce any liability against him. As a general rule, there is no written contract between the brokers, but when a transaction is made each one jots it down and reports it to his office, and later in the day they make comparisons of these. If the sale has been regularly made, a delivery of the stocks is made the next day, or at the time agreed upon, at the office of the purchasing broker.⁴⁸⁰

§ 809. Right to transfer stock on books in his own name.

After the broker has purchased and paid for the stock, he may have it transferred in his own name, or that of his clerk, so as to secure himself for the amount of advances made by him.⁴⁸¹ As he is to hold the shares as security for the balance of purchase money which he has advanced, it is proper, and entirely consistent with the nature of the transaction that he should take the title in his own name. This is necessary, moreover, for his safety; for if default should be made, he would have a right to sell it to reimburse himself, and he would be obliged, in that event, to give a title to the purchaser from him; and there does not seem to be anything unlawful in his transferring it to his clerks, if it remained under his control, and if he is ready, when called upon by the client, to transfer it to him upon the advances being paid.⁴⁸² This, however, does not prevent the client from voting upon the stock, as it is well settled that pledgors of stock may vote upon it.⁴⁸³

§ 810. Authority to advance money.

The broker's authority to advance money may be express or it may be implied from a course of dealing between the

⁴⁸⁰ See Dos Passos, *Stockbrokers, etc.*, p. 106.

⁴⁸¹ *Horton v. Morgan*, 19 N. Y. 170, 75 Am. Dec. 311; *Skiff v. Stoddard*, 63 Conn. 199; *Caswell v. Putnam*, 120 N. Y. 153; *Dos Passos, Stockbrokers, etc.*, p. 137.

⁴⁸² *Horton v. Morgan*, 19 N. Y. 170, 75 Am. Dec. 311.

⁴⁸³ *McDaniels v. Flower Brook Mfg. Co.*, 22 Vt. 274; *Dos Passos, Stockbrokers, etc.*, p. 137.

parties. Thus, where one authorizes a broker to buy wheat for him, and upon being told of the price requested to send his check remits a deposit, and upon up additional margin without being asked upon that his margins were exhausted, this indicates such of dealing as to give the broker implied authority to advance money to pay the margins and continue to trade for him.⁴⁸⁴

§ 811. Cannot purchase from or sell to himself.

The rule that an agent cannot, without the knowledge and consent of his principal, buy from or sell to himself is not applicable to the relation existing between a stockbroker and his customer. If the broker buys from or sells to his customer, without the latter's knowledge or consent, the contract is invalid, although the broker may have acted innocently and without any intention of fraud;⁴⁸⁵ he is bound to account to his customer for any profit he may have made out of the transaction.⁴⁸⁶ Such a contract cannot be made valid by custom or usage.⁴⁸⁷ There seems to be an exception to this rule where the stock is in the broker's hands, as pledgee, is sold at a public sale held under a decree to foreclose the pledge, in which case the broker may become the purchaser.⁴⁸⁸

⁴⁸⁴ *Van Dusen-Harrington Co. v. Jungeblut*, 75 Minn. St. Rep. 463.

⁴⁸⁵ *Marye v. Strouse*, 5 Fed. 483; *Bragg v. Meyer*, Mo. Cas. No. 1,801; *Stokes v. Frazier*, 72 Ill. 428; *Maryland v. Dalrymple*, 25 Md. 242, 89 Am. Dec. 779; *Baltimore v. Dalrymple*, 25 Md. 269; *Com. v. Cooper*, 130 Mass. 288; *Bond*, 36 N. Y. 427; *Taussig v. Hart*, 58 N. Y. 425; *Id.*, 85 N. Y. 365; *Mayo v. Knowlton*, 134 N. Y. 250; *Heston v. F. Pass. R. Co. v. Shields*, 3 Brewst. (Pa.) 257.

⁴⁸⁶ *Ersine v. Sachs*, 70 Law J. K. B. 978; and see also preceding note.

⁴⁸⁷ *Com. v. Cooper*, 130 Mass. 285; *Robinson v. Mollet*, 11 C. P. 362.

⁴⁸⁸ *Quincy v. White*, 63 N. Y. 370; *Bryan v. Baldwin*, 52 N. Y. 174; *Bryan v. Baldwin*, 52 N. Y. 232; *Wright v. I.*, 414; *Newport & C. Bridge Co. v. Douglass*, 12 Bush (I.

12. Duty in keeping stocks—Need not keep identical shares.

If the stockbroker keeps the stocks or securities in his possession, it is his duty to use a reasonable degree of diligence and care in caring for the same; and if he exercises proper precautions, he will not be liable if they are stolen or lost,⁴⁸⁹ but if he negligently or fraudulently allows them to be lost or misappropriated, he will be liable to his client for the loss.⁴⁹⁰ But the broker is not bound to keep on hand, at all times, the identical shares purchased by him for his client, or to keep them separate from his own shares. One share of stock is as good as another of the same kind, and the broker violates no duty to his client if he uses the securities left in him on a margin, in a manner consistent with his relation to his client, provided he keeps at all times, on hand, or under his control, ready for delivery to his customer, upon paying the broker the sum due thereon, either the particular shares purchased, or an equal number of other shares of the same kind.⁴⁹¹

The general rule is that the owner of personal property which has been wrongfully converted is entitled to recover the specific property or its value, and cannot be compelled to accept other property of the same kind and of equal value, in lieu of that which was converted. The reason of the rule is obvious. The owner may have special reasons for

Third Nat. Bank v. Boyd, 44 Md. 47, 22 Am. Rep. 35; *Dear v. Union Nat. Bank*, 58 Me. 273, 61 Me. 369; *Jenkins v. National Village Bank*, 58 Me. 275.

Butler v. Flinck, 21 Hun (N. Y.) 210; *La Marquise De Ribeyre v. Barclay*, 23 Beav. 107; *Stone v. Marsh*, 6 Barn. & C. 551.

Mocatta v. Bell, 27 Law J. Ch. 240; *Le Croy v. Eastman*, 10 Am. Rep. 499; *Atkins v. Gamble*, 42 Cal. 86, 10 Am. Rep. 282; *Thompson v. Toland*, 48 Cal. 99; *Hawley v. Brumagim*, 33 Cal. 394; *Skiff v. Toddard*, 63 Conn. 199; *Price v. Gover*, 40 Md. 112; *Worthington v. Ormev*, 34 Md. 193; *Wood v. Hayes*, 15 Gray (Mass.) 375; *Berlin v.ddy*, 33 Mo. 426; *Boylan v. Huguet*, 8 Nev. 345; *Horton v. Morris*, 19 N. Y. 170, 75 Am. Dec. 311; *Levy v. Loeb*, 85 N. Y. 365; *Wiegand v. Hart*, 58 N. Y. 425; *Caswell v. Putnam*, 120 N. Y. 153; *Amberlain v. Greenleaf*, 4 Abb. N. C. (N. Y.) 178; *Wynkoop v. Langton*, 64 Pa. 365; *Gilpin v. Howell*, 5 Pa. 41, 45 Am. Dec. 720. But *Langton v. Walte*, L. R. 6 Eq. 165.

desiring to retain that specific chattel; and the reasons why he attached a peculiar value to it, the value of other chattels of a precisely similar kind. The owner of such chattel cannot be compelled to give in lieu of it another which appears to be precisely of equal value. But the reason of the rule is not applied to stocks. One share represents the same interest in the business of the corporation that another share does, all the shares being of equal value, there can be no objection for preferring one from another, or for distinguishing one from another.⁴⁹²

In a late Connecticut case this rule has been applied as follows: "Shares of stock have no individuality, no marks. One share does not differ from another share like stock, in form, characteristic or value. Each share represents simply an undivided, proportionate interest in the ownership of the corporation. It entitles its owner to a certain right in the management, profits and ultimate assets of the corporation, precisely like that which every other share owner enjoys. Certificates of stock which are marked, are not stocks. They are muniments of title deeds. They have no value save as evidence of the thing owned, which has nothing individual, distinctive or peculiar about it. Courts have therefore said that no good reason existed for requiring that a pledgee should at all times preserve a careful separation of unquishable certificates connected with each transaction, and maintain the identity of each certificate as pledged, and unbroken. They have said that the essential thing is that he hold at all times the required shares of stock to be delivered when called for, and in recognition of the fact and of the right enjoyed by the pledgee to transfer the stocks held by him in pledge into his own name. We have held that a pledgee fully preserves the right of the pledgor if he at all times until the termination of the pledge retains similar stock in amount equal to that pledged."⁴⁹³

⁴⁹² *Atkins v. Gamble*, 42 Cal. 86, 10 Am. Rep. 282, 291; *Putnam*, 120 N. Y. 153, 157; *Taussig v. Hart*, 58 N. Y. 42.

⁴⁹³ *Skiff v. Stoddard*, 63 Conn. 198, 218.

But the stock restored or delivered must be of the same kind as that placed in his hands. He cannot restore to the owner fifty shares of "converted" stock, in the place of fifty shares of "consolidated" stock. It must be identically the same kind as the original.⁴⁹⁴

The parties may, however, expressly stipulate that the broker shall keep the particular stock. In which case it is the broker's duty to keep them on hand in the identical shape in which they were purchased, and if he breaks his contract, he will be liable for any loss arising upon the sale of stock substituted for the original. He must perform his contract in every respect, and upon every condition before he can recover in such a case.⁴⁹⁵

But if the broker is employed to sell a certain number of securities, and the specified amount is delivered to the broker, for that purpose, he is responsible if he transfers the securities to a third person, and the client may treat such transaction as a sale of his stock. As an agent of the client he discharges his duty if he does anything else with the stock than sell it. And he cannot introduce evidence of custom among brokers in defense of such transaction.⁴⁹⁶

13. Duty and liability in purchasing.

It is the broker's duty to use a reasonable degree of skill and care in purchasing the kind of stocks or securities which the client requests him to buy, and if he does so he will not be liable although the stocks prove to be spurious; nor will he be responsible if, in the absence of express instructions, he has acted according to the known usages of trade or business in making such purchase.⁴⁹⁷ Where a stockbroker is employed to buy a certain number of shares and he cannot

⁴⁹⁴ *Wilson v. Little*, 2 N. Y. 448, 51 Am. Dec. 307.

⁴⁹⁵ *Levy v. Loeb*, 35 N. Y. 365; *Hardy v. Jaudon*, 41 N. Y. 619, 30.

⁴⁹⁶ *Parsons v. Martin*, 11 Gray (Mass.) 111. Compare *In re Swift*, Fed. 493.

⁴⁹⁷ *McEwen v. Woods*, 11 Q. B. 13; *Whitehead v. Izod*, L. R. 2 C. 28; *Smith v. Lindo*, 5 C. B. (N. S.) 587; *Lambert v. Heath*, 15 Q. B. & W. 486; *Loeb v. Hellman*, 83 N. Y. 601; *Peckham v. Schum*, 5 Bosw. (N. Y.) 506; *Gheen v. Johnson*, 90 Pa. 38.

purchase the whole amount stated, he may purchase a number of shares. His undertaking is not to purchase the whole absolutely, but to buy as much stock and securities as he can obtain in the regular way, but within a fixed limit, unless there is something in the circumstances surrounding the transaction to show that the broker intended the purchase of the whole number of shares as to the value of a part.⁴⁹⁸

If the broker fails to follow his instructions and commits a breach of his contract, the purchaser may recover the deposits which he has placed in the broker's hands for the purchase of stocks;⁴⁹⁹ or any damages sustained by him by reason of the broker's failure to execute the order to give him notice of his refusal to do so.⁵⁰⁰ If a broker receives deposits from his customer as a security to secure him against loss in buying and selling in accordance with the customer's orders, it is a fraud for him to make fictitious purchases and sales, and report them to the customer, and on the discovery of the facts the customer may recover back his deposits.⁵⁰¹ And to entitle the client to the whole sum demanded, it is not necessary that all the transactions represented by defendant's account should be unreal; for if any of them, though real, show that they would not diminish the sum due plaintiff, the broker may increase it.⁵⁰²

But where the purchaser has failed to keep good faith, and gin, the mere fact that the broker has neglected his duty with some custom of the exchange is not such a breach of contract as will permit the purchaser to recover the whole he has deposited.⁵⁰³ So where stockbrokers sell certain stocks for a customer on a margin, and

⁴⁹⁸ *Marye v. Strouse*, 5 Fed. 486.

⁴⁹⁹ *Prout v. Chisolm*, 21 App. Div. (N. Y.) 54; *Decker v. Son*, 106 Ill. 433; *Higgins v. McCrea*, 23 Fed. 782; *Ellis v. Law J. Q. B.* 345, [1898] 1 Q. B. 426, 78 Law T. (N. S.)

⁵⁰⁰ *Galigher v. Jones*, 129 U. S. 193. And see *Pickens v. Merritt*, 100 Mass. 416; *Whelan v. Lynch*, 60 N. Y. 46.

⁵⁰¹ *Prout v. Chisolm*, 21 App. Div. (N. Y.) 54.

⁵⁰² *Prout v. Chisolm*, 21 App. Div. (N. Y.) 54.

⁵⁰³ *Patterson v. Keys*, 1 Circ. R. (Ohio) 94.

subject to his demand, the customer to advance sufficient money, when required, to protect them from loss, they are not bound to make an actual purchase of the stocks, but it is enough if they were ready and able at any time to procure them in the market and deliver them on demand at the price on the day of the contract. And if the stocks depreciate to the extent of the customer's account, no damage could have resulted to him from their failure to make an actual purchase.⁵⁰⁴

Where the parties have expressly agreed upon the terms and conditions of a contract, their liability or rights will be determined thereby, without regard to any usage or custom;⁵⁰⁵ and in this way a stockbroker may limit his liability to his client.⁵⁰⁶

§ 814. Duty and liability in selling.

So it is a stockbroker's duty, when employed to sell stock, to use a reasonable degree of skill, prudence, and care in making the sales, according to his client's instructions.⁵⁰⁷ Where the client has directed him to sell his stock at any time, he must do so within a reasonable time thereafter, and unless he does so he will be responsible for any loss that may result from his failure to obey his customer's instructions.⁵⁰⁸ And where he sells his customer's stock in violation of an agreement, the customer may either ratify and claim the benefit of the sale, or claim the value of the shares on the day of sale.⁵⁰⁹ Or the customer may require the broker to replace the stock, and, upon his failure to do so,

⁵⁰⁴ *Ingraham v. Taylor*, 58 Conn. 503, 18 Am. St. Rep. 291.

⁵⁰⁵ *Corbett v. Underwood*, 83 Ill. 324, 25 Am. Rep. 392.

⁵⁰⁶ *Markham v. Jaudon*, 41 N. Y. 435; *Robinson v. Norris*, 51 How. Pr. (N. Y.) 442; *Baker v. Drake*, 66 N. Y. 518, 23 Am. Rep. 80; *Stenton v. Jerome*, 54 N. Y. 480; *Wicks v. Hatch*, 62 N. Y. 535; *Milliken v. Dehon*, 27 N. Y. 364.

⁵⁰⁷ *Taussig v. Hart*, 58 N. Y. 425; *Jones v. Marks*, 40 Ill. 313; *Pulsifer v. Shepard*, 36 Ill. 513.

⁵⁰⁸ *Zimmermann v. Hell*, 86 Hun, 114, 156 N. Y. 703; *Allen v. McConihe*, 124 N. Y. 342; *Hollingshead v. Green*, 1 Circ. R. (Ohio) 305; *Johnston v. Miller*, 67 Ark. 172.

⁵⁰⁹ *Taussig v. Hart*, 58 N. Y. 425; *Strong v. National Mechanics' Banking Ass'n*, 45 N. Y. 718.

may replace it himself and charge the broker with the loss;⁵¹⁰ or he may recover the advance in the market from the time of the sale up to a reasonable time after the stock after notice of the sale.⁵¹¹ The broker may, however, introduce evidence to show that a written order for stock at a designated price was later modified by an understanding for delay as to time, on the ground that the agreement did not contradict the written power to sell at the price named.⁵¹² So a receipt in a broker's contract for the sale of stock, acknowledging the receipt of the full payment or the margin on the contract, is only prima facie evidence of the payment of the money, and may be rebutted by parol testimony.⁵¹³ If the broker has received instructions from his client, he may make a sale according to the usages of brokers, and in so doing will violate no duty to his client.⁵¹⁴ And although a customer may ratify an unauthorized sale of stocks made on his behalf, it cannot be said, as a matter of law, that his failure to return the account of the sale subsequently sent to him by the broker operated as an acquiescence in, or a ratification of, the unauthorized sale, where he distinctly informed the broker that the sale was unauthorized.⁵¹⁵

Where a customer refuses to deliver stock when the broker sells pursuant to contract, the latter may go into the market and buy it at the best price he can and charge the customer for the loss.⁵¹⁶

§ 815. Duty on "short sales."

A "short sale" is where a sale is made before a purchase with the idea of purchasing at a lower price. In

⁵¹⁰ *Baker v. Drake*, 53 N. Y. 211, 217, 13 Am. Rep. 507; *Owens*, 90 N. Y. 368; *Gruman v. Smith*, 81 N. Y. 25.

⁵¹¹ *Colt v. Owens*, 90 N. Y. 368; *Gruman v. Smith*, 81 N. Y. 25; *Capron v. Thompson*, 86 N. Y. 418; *Baker v. Drake*, 53 N. Y. 217, 13 Am. Rep. 507.

⁵¹² *Clarke v. Meigs*, 10 Bosw. (N. Y.) 337; *Bickett v. T. How. Pr.* (N. Y.) 126.

⁵¹³ *Winans v. Hassey*, 48 Cal. 635.

⁵¹⁴ *Sutton v. Tatham*, 10 Adol. & E. 27; *Bayliffe v. Butterfield*, 10 Exch. 425; *Young v. Cole*, 3 Bing. N. C. 724.

⁵¹⁵ *Burhorn v. Lockwood*, 71 App. Div. (N. Y.) 301.

⁵¹⁶ *Bally v. Carnduff*, 14 Colo. App. 169.

carry out such a sale, the broker must temporarily borrow stock for delivery. If sold "short" in the "regular" way, the delivery must be made the next day after the sale. But if sold to be delivered at a future time, that is at seller's or buyer's option, then the broker need not deliver until the option expires, or until the purchaser calls for them. The client has the right, at any time, to direct his brokers to buy in the stock and close the transaction. Until so bought in, it is the broker's duty, when demanded, to return to the persons from whom they obtain the stock an equal number of shares, whatever may be the market price at the time.⁵¹⁷ The broker's duty is not fully performed by the sale, under an agreement to make a "short sale," for commission and upon a deposit. It is also a part of the agreement that he shall carry the stock for a reasonable time. If the margin is not kept good, he may, upon notice and demand, close the transaction; and after he has carried it for a reasonable time, he may, upon reasonable notice, close it. He is not bound to continue the transaction indefinitely, although the client's margin may not be exhausted.⁵¹⁸ But, in the absence of an express contract to that effect, he has no right to buy in stock to cover the sale without notice to or direction from his client, and if he does so he will be liable for any loss resulting to his client therefrom.⁵¹⁹ But when the client so orders or directs the broker, it is his duty to buy in stocks and return them to the person from whom he had originally borrowed. And this completes the transaction. If he has been able to purchase stocks at a lower price than that for which they were sold, the difference is the client's profit, if not, the client suffers loss.⁵²⁰

⁵¹⁷ *Smith v. Bouvier*, 70 Pa. 325; *Maxton v. Gheen*, 75 Pa. 166; *Nowlton v. Fitch*, 52 N. Y. 288; *White v. Smith*, 54 N. Y. 522; *Dogers v. Wiley*, 131 N. Y. 527.

⁵¹⁸ *Stenton v. Jerome*, 54 N. Y. 480; *Sterling v. Jaudon*, 48 Barb. (N. Y.) 459; *White v. Smith*, 54 N. Y. 522; *Merwin v. Hamilton*, 1 Duer (N. Y.) 244; *Esser v. Linderman*, 71 Pa. 76.

⁵¹⁹ *White v. Smith*, 54 N. Y. 522; *Staples v. Gould*, 9 N. Y. 520; *Lazare v. Allen*, 20 App. Div. (N. Y.) 616, holding that one hour is not a reasonable notice.

⁵²⁰ See *Dos Passos, Stockbrokers, etc.*, 184-187; *White v. Smith*,

§ 816. Duty and liability in case of "stop orders."

Often a client gives his broker what is called "stop order," which authorizes and directs the broker to sell stocks, as the case may be, when they arrive at a certain price, or upon a specified contingency, in which case the broker must buy or sell when they reach that price. If the contingency happens as made by some third person, the broker must buy or sell when the stock reaches that certain price, made by some other broker. He cannot sell at a higher price, nor can he make the price himself. If, however, the broker is unable to sell when the stock reaches the figure specified in the usage of Wall Street allows him to sell at the next price after the fixed price or contingency happens. The broker must strictly obey the instructions of his client, and is liable in answer for him to say that by disobeying them an action has been accrued to his principal.⁵²¹

§ 817. Dissent by principal.

If a broker does not obey his instructions, the client must dissent within a reasonable time, dissent from his acts. If he does not wait to see whether the act has resulted advantageously or not, to him, and then make his determination. If he does not dissent within a reasonable time, the broker will be liable for only the actual loss sustained, and not what he might have been had he sold at a higher price according to the instructions.⁵²²

§ 818. Rights and duties of stockbrokers on margin.

When the "margin" which the customer deposits with his broker is not sufficient to meet the fluctuations of the market, it is the broker's duty to notify his customer of the fact and to demand additional margin; also in case of a

⁵⁴ N. Y. 522; *Knowlton v. Fitch*, 52 N. Y. 238; *Staples v. Fitch*, 9 N. Y. 520; *White v. Smith*, 6 Lans. (N. Y.) 5.

⁵²¹ *Dos Passos, Stockbrokers, etc.*, 166, 167; *Bertram v. Knapp*, 381; *Nesbitt v. Helser*, 49 Mo. 383; *Campbell v. Knapp*, 118 N. Y. 594; *Bush v. Cole*, 28 N. Y. 261, 84 Am. Dec. 118; *Gwynne*, 57 N. Y. 676; *Smith v. Bouvier*, 70 Pa. 325.

⁵²² *Hope v. Lawrence*, 50 Barb. (N. Y.) 258.

tends to sell, that unless the margin is made good he will close the transaction, holding the customer liable for the loss. The broker cannot, without any previous notice and demand for further margin, summarily dispose of his client's stocks. If, however, after the customary and reasonable notice and demand, the client fails to secure the broker with sufficient margins, the latter may sell the stocks, and the customer will be liable for the loss, if any.⁵²³ A custom of the stock exchange allowing such a sale to be made without demand and notice, cannot be shown,⁵²⁴ unless such custom has entered into and formed a part of the original contract itself.⁵²⁵

It is essential that demand for additional margin be made, and, upon failure to furnish it, notice given that sale will be made, in order that the broker may make a valid sale of stock purchased on margin.⁵²⁶ If the broker sells without complying with these rules, he will be guilty of conversion.⁵²⁷ What is a reasonable notice to a purchaser to furnish additional margin depends upon the circumstances of each case.⁵²⁸ The broker may, however, at the beginning of his undertaking, in order to protect himself, demand sufficient margin to cover any fluctuations; and he may make a special contract with his client, permitting him to dis-

⁵²³ *Perin v. Parker*, 126 Ill. 201, 9 Am. St. Rep. 571, 17 Ill. App. 169; *Denton v. Jackson*, 106 Ill. 433; *Corbett v. Underwood*, 83 Ill. 324, 25 Am. Rep. 392; *Møller v. McLagan*, 60 Ill. 317; *Foote v. Smith*, 136 Mass. 92; *Farrar v. Paine*, 173 Mass. 58; *Minor v. Beveridge*, 67 Hun (N. Y.) 1; *Rogers v. Wiley*, 131 N. Y. 527; *Baker v. Drake*, 66 N. Y. 518, 23 Am. Rep. 80; *Hanks v. Drake*, 49 Barb. (N. Y.) 186; *Gruman v. Smith*, 81 N. Y. 25; *Ritter v. Cushman*, 35 How. Pr. (N. Y.) 284.

⁵²⁴ *Markham v. Jaudon*, 41 N. Y. 235; *Taylor v. Ketchum*, 35 How. Pr. (N. Y.) 289.

⁵²⁵ *Appleman v. Fisher*, 34 Md. 540; *Denton v. Jackson*, 106 Ill. 433; *Corbett v. Underwood*, 83 Ill. 324, 25 Am. Rep. 392.

⁵²⁶ *Gruman v. Smith*, 81 N. Y. 25.

⁵²⁷ *Baker v. Drake*, 66 N. Y. 518, 23 Am. Rep. 80; *Rogers v. Wiley*, 131 N. Y. 527.

⁵²⁸ *Lazare v. Allen*, 20 App. Div. (N. Y.) 616 (one hour's notice was inadequate); *Stewart v. Drake*, 46 N. Y. 449 (two days' notice was more than was necessary); *Perin v. Parker*, 17 Ill. App. 169 (fifteen minutes was not reasonable notice).

pose of securities in any manner and at any time be agreed upon without notice.⁵²⁹ Thus a broker may agree to buy and hold certain stock for a customer, pay a part of the purchase price down, and agree to pay interest on the broker's advances, and in case of a decline in a certain margin in excess of the market price, to pay the same at the broker's board without notice to the customer, after his failure to make the required advance to the broker's demand.⁵³⁰ Or the purchaser may waive his right to the notice as not being sufficient,⁵³¹ or the broker may waive his right to demand more margins and the customer may account and sell the stock in the absence of additional margin.⁵³² If, at the time the margin is deposited, the customer is expressly instructed that, should the fluctuation in price of the stock involved be adverse to the interest of the customer, the customer does not wish to protect himself by action beyond the amount of the margin deposited, the broker is incumbent upon the broker to terminate the transaction when the margin is exhausted.⁵³³

Where the transaction does not amount to a sale of stock, it seems that this rule requiring notice does not apply to the broker having the right to buy or sell when the margin is exhausted to protect himself.⁵³⁴ And where a broker, according to the custom of the stock exchange, has a right on the part of the customer to pay margins, to close out the deal, or to sell it on the floor of the exchange, the mere fact that the stock was purchased by another corporation, some of whose officers were officers of the corporation acting as brokers, does not avoid the sale in the absence of any showing

⁵²⁹ *Ritter v. Cushman*, 7 Rob. (N. Y.) 298; *Taylor v. Taylor*, 5 Rob. (N. Y.) 513; *Markham v. Jaudon*, 41 N. Y. 24; *Hatch*, 62 N. Y. 535; *Stenton v. Jerome*, 54 N. Y. 4; *Stoddard*, 63 Conn. 199.

⁵³⁰ *Covell v. Loud*, 135 Mass. 41, 46 Am. Rep. 446.

⁵³¹ *Gillett v. Whiting*, 141 N. Y. 71, 38 Am. St. Rep. 7.

⁵³² *Rogers v. Wiley*, 131 N. Y. 527; *Ellis v. Pond*, 67 N. Y. B. 345, [1898] 1 Q. B. 426, 78 Law T. (N. S.) 125—by agreement to hold the stock for a certain time.

⁵³³ *Davis v. Gwynne*, 57 N. Y. 676; *Parsons v. Martineau*, 111 (Mass.) 111.

⁵³⁴ *Sterling v. Jaudon*, 48 Barb. (N. Y.) 459.

purchaser suffered some prejudice or injury by such relation.⁵³⁵

If the principal refuses to deposit additional margin where he has ordered the broker to sell for him, the broker may buy immediately to protect himself. But if the principal's refusal to furnish sufficient margin is not absolute, but conditional only, the broker is not obliged to buy immediately to cover the sale. And is not required to buy until it is necessary for him to deliver the property already sold.⁵³⁶

— **Where margin not exhausted.** But where the margin is not yet exhausted, the broker has no right to sell the stock without instructions from his customer to do so.⁵³⁷ And this rule also applies to a purchase of stock to cover a sale which has been made for his principal.⁵³⁸

§ 819. Measure of damages for wrongful acts.

There has been a distinct difference of opinion with reference to the measure of damages recoverable where a broker, having in his possession stocks belonging to his customer, converts the same to his own use. The earlier decisions were inclined to the view that the highest market price the stocks reach between the time they are wrongfully converted and the time of trial measures the damage a customer has suffered.⁵³⁹ Under later decisions, however, the severity of this rule has been modified, and the measure of damages has been held to be the highest market price the stocks have reached between the date of conversion and such time after notice of conversion as allows the customer a reasonable time within which to replace the stock.⁵⁴⁰ This is

⁵³⁵ Van Dusen-Harrington Co. v. Jungeblut, 75 Minn. 298, 74 Am. St. Rep. 463.

⁵³⁶ Perin v. Parker, 126 Ill. 201, 9 Am. St. Rep. 571.

⁵³⁷ Denton v. Jackson, 106 Ill. 433.

⁵³⁸ White v. Smith, 54 N. Y. 522.

⁵³⁹ Markham v. Jaudon, 41 N. Y. 235; Romaine v. Van Allen, 26 N. Y. 309; Douglass v. Kraft, 9 Cal. 562. See, also, Wilson v. Whitaker, 49 Pa. 114. And see Helliwell, Stock & Stockh. 367.

⁵⁴⁰ Minor v. Beveridge, 141 N. Y. 399, 38 Am. St. Rep. 804; Colt v. Owens, 90 N. Y. 368; Wright v. Bank of Metropolis, 110 N. Y.

an exception to the ordinary rule that for the conversion of personal property the damage recoverable by the owner is its value at the time of the conversion. The reason for the exception lies in the fact that stock has a fluctuating value. The stock market at times is very panicky and the customer would be at the mercy of the broker were the latter at liberty without notice to require of the customer for additional margin to sell the stock at a time when the market is depressed. Such stocks are usually held and in the hands of brokers for speculation. The measure of damages is what it would cost the customer to replace the stock within a reasonable time. The customer is given a reasonable time to replace the stock rather than to determine whether he wishes to or is able to replace it, for replacing it is not a condition precedent to his right to recover damages.⁵⁴¹ If the broker agrees to carry his customer's account open to a certain time, and he fully closes it before that time, the measure of damages is the highest price the stocks and shares would have fetched between the date he so wrongfully closed the account and the date to which he agreed to carry it over.⁵⁴²

But if the customer so desires, instead of suing for the damages as stated above, he may demand from the broker the actual price received for the stock.⁵⁴³

§ 820. Profits, calls, assessments, etc.

As stock, when purchased, becomes the property of the client, all profits or benefits resulting therefrom belong to him,⁵⁴⁴ and for the same reason he is liable for a

237, 6 Am. St. Rep. 356; *Baker v. Drake*, 53 N. Y. 211; *C. Smith*, 81 N. Y. 25; *Burhorn v. Lockwood*, 71 App. Div. 301; *Gallagher v. Jones*, 129 U. S. 193. Compare *Brewster v. Llewellyn*, 119 Ill. 554.

⁵⁴¹ *Burhorn v. Lockwood*, 71 App. Div. (N. Y.) 301; *Savin*, 141 N. Y. 315.

⁵⁴² *Michael v. Hart*, 70 Law J. K. B. 1000, [1901] 2 K. B. 1000.

⁵⁴³ *Strong v. National Mechanics' Banking Ass'n*, 45 N. Y. 237; *Taussig v. Hart*, 58 N. Y. 425. See, also, *Allen v. McCarty*, 10 N. Y. 342; *Sillcocks v. Gallaudet*, 66 Hun (N. Y.) 522.

⁵⁴⁴ *Gruman v. Smith*, 81 N. Y. 25; *Hasbrouck v. Vandewater*, 10 N. Y. 235; *Markham v. Jaudon*, 41 N. Y. 235.

or assessments" made upon the stock while he is the owner thereof, although the broker may have paid them in the first instance, by reason of the stock being transferred on the books in his name.⁵⁴⁵ But as the broker has the right to have the stock transferred on the books of the company in his name, he has the right and it is his duty to collect all dividends accruing while the stock is in his hands. And if the dividend is paid to the pledgor, the broker may maintain an action against him for its recovery.⁵⁴⁶

⁵⁴⁵ *McCalla v. Clark*, 55 Ga. 53.

⁵⁴⁶ *Gaty v. Holliday*, 8 Mo. App. 118; *Androscoggin R. Co. v. Auburn Bank*, 48 Me. 335.

CHAPTER XXI.

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I. DEFINITION AND DISTINCTIONS.

§ 821. Definition and nature.

A factor is one who, as a business, receives assignments of goods or merchandise, for a commission, called commissions or factorage.¹ It is one of the essential characteristics of a factor that it is his business to buy and sell goods on commission. "As soon as a factor branches out of the party's business to sell the goods on commission, that establishes him to be a factor."

¹ See *Baring v. Corrie*, 2 Barn. & Ald. 143; *Perkins v. Baring*, 10 Ala. 154; *Lehmann v. Schmidt*, 87 Cal. 15; *Winne v. Baring*, 10 Ill. 99; *Burton v. Goodspeed*, 69 Ill. 237; *Shaw v. Ferguson*, 547; *Cotton v. Hiller*, 52 Miss. 13; *State v. Thompson*, 10 Peck v. Ritchey, 66 Mo. 114; *Bradford v. Kimberly*, 10 (N. Y.) 431; *Duguid v. Edwards*, 50 Barb. (N. Y.) 431; *McFeeters*, 97 N. Y. 196; *Higgins v. Grindrod*, 40 L. 494; *Milburn Mfg. Co. v. Peak*, 89 Tex. 209; *Edgerton v. Peak*, 66 Wis. 124; *McGraft v. Rugee*, 60 Wis. 406, 50 Am. 124.

A factor is "an agent employed to sell goods or merchandise, signed or delivered to him, by or for his principal, for a commission, commonly called 'factorage' or 'commission'." *Dict. p. 354*; *Story, Agency*, § 33. Factors have also been defined as "those who are appointed to transact a particular business in the name of another and not in their own." *Ward v. Mart. (La.)* 331, 13 Am. Dec. 352. The faultiness of this definition is too apparent to need further comment, as it is rather applicable to brokers than of factors.

Where the owner of goods delivers them to another person, to exchange under a written contract, by which the latter is charged with them, and credited with payments from the owner, and is to sell in his own name, but the property in the goods and their proceeds is to remain in the owner and subject to his order, the transaction is not a sale so as to subject the goods to the proceeds, to attachment by creditors of the party so receiving them, but the latter is merely a factor. *Blood v. Palmer*, 10 Am. Dec. 547. But an agent for collecting debts is not a factor. *Hopkirk v. Bell*, 3 Cranch (U. S.) 454; *Lawrence v. Ington Bank*, 6 Conn. 521. So a traveling salesman who is to solicit and accept orders and agree on prices for the goods, to direct shipment of the goods, and also to buy goods from the dealers to fill such orders, is not a factor, within the meaning of the factors' act. *Sage v. Shepard & M. Lumber Co.* 672.

² *Whitfield v. Brand*, 16 Mees. & W. 282, 288. One

this it follows that the mere fact that a person has undertaken, in one or occasional instances, to receive and sell goods on commission, would not constitute him a factor.

Although it is the usual mode of business for the factor to sell on commission, yet, in some cases, he may receive his compensation in some other form, as by a salary,³ or by a certain share in the profits of the sale,⁴ or by taking all excess of proceeds over a certain price.⁵ Or it is possible that he may render his services gratuitously; but these exceptional cases do not affect the fact that it is usual or customary for him to receive a commission. Nor does a factor lose that character by reason of the fact that he has performed some act of labor upon the goods, before sale, even if it amounts to changing their form.⁶ Thus, a factor is none the less such because he has entirely changed the character of the property, as where milk is converted into butter and cheese.⁷

A factor is also often called a commission merchant or consignee, and the goods received by him for sale are called a consignment. But a "commission merchant" as the term is generally used is synonymous with "factor."⁸ So also he is called a "supercargo," if he accompany a cargo on a voyage and has it in charge to sell.⁹ Likewise he is called a "home factor" or "foreign factor," according as he resides in the same or a different country from his principal. But

a salary in business carried on in the principal's name is not a factor. *Florence Sewing Mach. Co. v. Warford*, 1 Sweeny (N. Y.) 433.

³ *State v. Thompson*, 120 Mo. 12; *Winne v. Hammond*, 37 Ill. 99; *Lawrence v. Stonington Bank*, 6 Conn. 527; *Nagle v. McFeeters*, 97 N. Y. 196; *Blood v. Palmer*, 11 Me. 414, 26 Am. Dec. 547.

⁴ *Burton v. Goodspeed*, 69 Ill. 237.

⁵ *Bridgeport Organ Co. v. Guldin*, 3 Pa. Dist. R. 649.

⁶ *State v. Thompson*, 120 Mo. 12; *Shaw v. Ferguson*, 78 Ind. 554; *Elgin First Nat. Bank v. Schween*, 127 Ill. 573.

⁷ *Elgin First Nat. Bank v. Schween*, 127 Ill. 573.

⁸ *Perkins v. State*, 50 Ala. 154; *Thompson v. Woodruff*, 7 Cold. (Tenn.) 401.

⁹ *Stone v. Waitt*, 31 Me. 409, 52 Am. Dec. 621; *The Waldo*, 2 Ware, 165, Fed. Cas. No. 17,056; *Taylor v. Wells*, 3 Watts (Pa.) 65; *William v. Nichols*, 13 Wend. (N. Y.) 58. See Cyc. Law Dict. p. 884.

under all these different titles, it remains that he is a factor, subject to all the liabilities, and having all the rights and duties of this class of agents.

§ 822. Distinction between factor and broker.

A factor, unlike a broker, has possession of the goods he sells, and also he may buy and sell in his own name. A broker, generally, cannot do. The test as to whether an agent is merely a broker or is a factor is to be found in the question, whether he has any possession or special property in the subject-matter of sale; for if he has, he is a factor, although he may unite the two characters. If he has no possession or special property he is merely a broker, and his rights, duties, and liabilities are different.

II. APPOINTMENT AND EXISTENCE OF THE RELATION.

§ 823. In general.

A factor may be appointed like other agents, and expressly required no formal mode of doing so in writing. It may be by writing, by words, or it may be inferred from the acts of the parties; or the principal may ratify acts of a factor previously unauthorized. The mode of appointing a factor, however, is by proof. A factor's retainer may be proved by oral testimony, or by material whether a retainer is proved at all, and whether written by him show that he received and sold the goods. It is necessary, however, that not only shall there be an appointment by the principal, but also that the factor be appointed, before the relation exists.¹² It is, of course, only where goods are consigned to one to be sold for

¹⁰ Story, Sales (3d Ed.) § 91. See, ante, c. 20.

¹¹ Dasher v. Beers, 32 Ill. 368, 83 Am. Dec. 274.

¹² Rapp v. Livingston, 14 Daly (N. Y.) 402. An agent who sells as factor or consignee, certain goods, to be sold for the principal, with a provision that until settlement made, the goods, money, amounts, etc., arising from sales, shall be considered as belonging to the consignor, and, as such, be sold, creates the relation of principal and agent. See v. Shober, 3 Pa. Super. Ct. 554.

compensation and the proceeds to be accounted for to the consignor, it is a consignment for sale on commission and not a sale,¹³ and the person to whom they are thus consigned is thereby created a factor.

§ 824. Requirement of license.

In some jurisdictions, it is expressly provided by statute that a person who engages in the business of a factor therein shall take out a license for that purpose, and comply with any other provision that may be prescribed by such statute.¹⁴ The object of such statutes is "to prevent fraud; to compel any person transacting business as a trader to disclose the name of the real owner of the business, if any there be, to prevent shifting or evasion of ownership and liability of debts in case of controversy and to preclude the assertion of secret claims of ownership against creditors of him who has conducted the business, possessed the property, and appeared to be its owner."¹⁵ Under an ordinance requiring "commission merchants and produce dealers" to obtain a license, a produce dealer must obtain a license, though he is not engaged in the business of commission merchant.¹⁶ Such a statute, however, does not apply to one who acts as factor in one or occasional instances only, and not as a business.¹⁷

§ 825. Termination.

If the factor has acquired no interest in goods consigned to him, as by making advances thereon, as a general rule his authority to sell the same may be terminated as in the case

¹³ *W. O. Dean Co. v. Lombard*, 61 Ill. App. 94; *Planters' M. Ins. Co. v. Engle*, 52 Md. 468; *Buckley v. Packard*, 20 Johns. (N. Y.) 421; *Bridgeport Organ Co. v. Guldin*, 3 Pa. Dist. R. 649; *Milburn Mfg. Co. v. Peak*, 89 Tex. 209; *Pam v. Vilmar*, 54 How. Pr. (N. Y.) 235.

¹⁴ *Code Va.* § 2877; *Edmunds v. Hobbie Piano Co.*, 97 Va. 588; *Hoge v. Turner*, 96 Va. 624; *Meal v. Com.*, 21 Grat. (Va.) 511; *Lasher v. People*, 183 Ill. 226; *State v. Wagener*, 77 Minn. 483.

¹⁵ *Hoge v. Turner*, 96 Va. 624.

¹⁶ *Kansas City v. Grush*, 151 Mo. 128.

¹⁷ *Perkins v. State*, 50 Ala. 154.

of other agencies, at the will of the principal. If the principal revokes his factor's authority it is necessary that he give notice thereof both to the factor and to the third party with whom the factor has been accustomed or authorized to deal.¹⁹ But, as will be seen in a subsequent section, if the factor has made advances on the goods, he has a special interest therein that the principal cannot control. He may sell so much of the goods as is necessary to reimburse himself, and he cannot in such case terminate his authority unless he repays to the factor the amount paid out. Under such circumstances, the factor has a power of sale with an interest which cannot be terminated, even by the death of the principal.²¹

Likewise the factor may, upon giving reasonable notice, that effect, renounce his agency at any time,²² in the absence of an agreement to the contrary. So the factor's authority would be terminated by his death,²³ although he has a special interest in the goods by reason of advances made. It may not be so terminated;²⁴ or by his insolvency.²⁵ The general rules of agency, in reference to the termination of the relation, also apply to factors, to which the rules preferred, for a further treatment of this subject.²⁶

¹⁸ *Farmer v. Robinson*, 2 Camp. 339, note; *Ryberg v. Wash.* C. C. 403, Fed. Cas. No. 12,190; *Succession of O'Connell*, La. 298; *Jones v. Sinclair*, 2 N. H. 319, 9 Am. Dec. 75; *James*, 5 Ohio, 100; *Roberts v. Andrews*, 15 Pa. Sup. 100; *Torre v. Thiele*, 25 La. Ann. 418. The sale of the goods by the principal revokes the factor's authority to sell.

¹⁹ *Jones v. Hodgkins*, 61 Me. 480.

²⁰ *Succession of Gragard*, 106 La. 298. And see post, § 100.

²¹ *Knapp v. Alvord*, 10 Paige (N. Y.) 205, 40 Am. Dec. 100; *Hammonds v. Barclay*, 2 East, 227; *Willingham v. Rush*, 72. But see *Smart v. Sandars*, 5 C. B. 895.

²² *Barrows v. Cushway*, 37 Mich. 481; *Du Peirat v. V.* Y. 436.

²³ *Jackson Ins. Co. v. Partee*, 9 Heisk. (Tenn.) 296; *Conson*, 1 Brev. (S. C.) 495, 2 Am. Dec. 682.

²⁴ *Hammonds v. Barclay*, 2 East, 227.

²⁵ *Audenried v. Betteley*, 8 Allen (Mass.) 302; *Terry v. Ger*, 44 Conn. 558.

²⁶ Ante, ch. 7.

III. POWERS AND INTERESTS.

§ 826. In general—Express or implied.

In general a factor has such powers as are expressly conferred upon him, and such powers as may reasonably be inferred therefrom, and also such other implied powers as are usually exercised by others in the same line of business at the same time and place. These powers may of course be either narrowed or extended by express instructions from the principal;²⁷ and persons dealing with factors concerning goods entrusted to them are charged with notice of the extent and limitations upon their powers. If a transaction is brought into question by the owner of the goods, the burden of proving the factor's authority is upon the party dealing with him.²⁸

§ 827. Effect of usage.

A factor's powers are to a large extent regulated by usages of trade, as it is from the latter that many of his powers originated. In this respect a factor's powers are similar to those of a broker. In determining a factor's powers, therefore, these usages of trade are depended upon to a large extent.²⁹ "A person who deals in a particular market, must

²⁷ An agreement under which goods were consigned to a factor for sale contained these provisions: That the goods should continue the property of the consignors until sale was made, "approved by them"; that the consignee should notify the consignors "whenever any sale is made, stating the terms thereof"; and that the consignee should sell the goods "for account of consignors, and account to them therefor." It was held that the consignee had the right to sell without the approval of consignors, and in doing so would not be guilty of conversion. *Hassett v. Cooper*, 20 R. I. 585.

²⁸ *Barnes Safe & Lock Co. v. Bloch Bros. Tobacco Co.*, 38 W. Va. 158, 45 Am. St. Rep. 846.

²⁹ *Johnston v. Osborne*, 11 Adol. & E. 549; *Forrestier v. Boardman*, 1 Story, 43, Fed. Cas. No. 4,945; *Hatcher v. Comer*, 73 Ga. 418; *Bailey v. Bensley*, 87 Ill. 556; *Phillips v. Moir*, 69 Ill. 155; *Wallace v. Bradshaw*, 6 Dana (Ky.) 382; *Byrne v. Schwing*, 6 B. Mon. (Ky.) 199; *Randall v. Kehlror*, 60 Me. 37; *Roosevelt v. Doherty*, 129 Mass. 303, 37 Am. Rep. 356; *Upton v. Suffolk County Mills*, 11 Cush. (Mass.) 586, 59 Am. Dec. 163; *Chesterfield Mfg. Co. v. Dehon*, 5 Pick. (Mass.) 7, 16 Am. Dec. 367; *Goodenow v. Tyler*, 7 Mass. 36, 5

be taken to deal according to the known, general form custom of that market; and he who employs to act for him at a particular place or market must be intended that the business will be done according to the usage or custom of that place or market, whether the principal in fact knew of the usage or custom or not."²⁸ It must be remembered, however, that this doctrine is merely a presumption, which may be rebutted by evidence showing that the parties did not intend to deal according to the customs, as where they excluded such custom by express agreement.³¹ But in the absence of expressions to the contrary, the factor may transact business taken by him for his principal, according to the prevailing custom of that place, and place.³² A factor to whom wheat is consigned for storage in a bin and for sale, may, according to custom, store it in a bin with other wheat of the same grade and in the absence of instructions from the consignor contrary.³³

In order that such usage may be valid, however, it is necessary that it should have been general and accepted by others in the same business at the same place, and it was not contrary to positive law.³⁵

Am. Dec. 22; *Cotton v. Hiller*, 52 Miss. 7; *Burke v. F.* 223; *Kauffman v. Beasley*, 54 Tex. 563; *Neill v. Billing* 161; *McConnico v. Curzen*, 2 Call (Va.) 358, 1 Am. Dec.

³⁰ *Bailey v. Bensley*, 87 Ill. 556; *Bayliffe v. Butterworth* 425; *Sutton v. Tatham*, 10 Adol. & E. 27; *United States v. Advance Co.*, 80 Ill. 549; *Lyon v. Culbertson*, 83 Ill. 425. It has been held that the factor must show that the principal ought to have known of such usage, or consented to it, or of doing business; and unless the factor does so he will be relieved from a duty or liability which the law would otherwise impose upon him. *Duguid v. Edwards*, 50 Barb. (N. Y.) 425; *Wooters & M. Nat. Bank v. Sprague*, 52 N. Y. 605.

³¹ *Deshler v. Beers*, 32 Ill. 368, 83 Am. Dec. 274.

³² *Phillips v. Moir*, 69 Ill. 155; *Davis v. Kobe*, 36 Minn. 214, 1 Am. St. Rep. 663; *Dwight v. Whitney*, 15 Pick. (Mass.) 179; cited ante, this section.

³³ *Davis v. Kobe*, 36 Minn. 214, 1 Am. St. Rep. 663.

³⁴ *Wooters v. Kauffman*, 73 Tex. 395; *Neill v. Billing*

§ 828. Interest in goods consigned for sale.

Before going further into a factor's powers, it will be well to consider the effect of a consignment to him, his interest in the goods by such consignment, and when he has title thereto sufficient to enable him to make a sale thereof and to pass a good title.

A consignment of goods is not a sale thereof, but is merely the shipping of goods by one, called the consignor, to another, called the consignee or factor, for the purpose of sale, for the former. Ordinarily, if goods are "consigned" for sale, it is a bailment, and not a sale to the consignee. The consignor of the goods to be sold on commission does not part with his title by the consignment, nor do the goods become the property of the consignee or factor, nor liable for his debts; and the rule is the same whether they were consigned on a *del credere* commission, or whether the factor or consignee has made advances for the principal;³⁶ and the fact that the goods were invoiced at a stated price does not itself constitute the transaction a sale unless the terms of the consignment are such as to make the consignee, when the goods are sold, the purchaser and principal debtor for the goods.³⁷

If, however, the factor has advanced money upon the goods consigned to him for sale, he has a special interest or property therein to the extent of such advances. He has then a vested interest in the goods, and so far as would be necessary for the protection and security of his advances, charges and interests he could hold the goods against third parties or

161; *Farmers' & M. Nat. Bank v. Sprague*, 52 N. Y. 605; *Lyon v. Culbertson*, 83 Ill. 33.

³⁶ *Newbold v. Wright*, 4 Rawle (Pa.) 213; *Duguid v. Edwards*, 50 Barb. (N. Y.) 288.

³⁶ *Barnes Safe & Lock Co. v. Bloch Bros. Tobacco Co.*, 38 W. Va. 158, 45 Am. St. Rep. 846; *Sturm v. Boker*, 150 U. S. 312; *United States v. Villalonga*, 23 Wall. (U. S.) 35; *Bonner v. Marsh*, 10 Smedes & M. (Miss.) 376, 48 Am. Dec. 754; *Bank of Rochester v. Jones*, 4 N. Y. 497, 55 Am. Dec. 290; *Commercial Nat. Bank v. Hellbrunner*, 108 N. Y. 439; *Peek v. Helm*, 127 Pa. 500, 14 Am. St. Rep. 865.

³⁷ *Barnes Safe & Lock Co. v. Bloch Bros. Tobacco Co.*, 38 W. Va. 158, 45 Am. St. Rep. 846.

even against the consignor himself.³⁸ Where advances money upon the faith that proceeds remain in the owner's hands will be applied to his reimbursement, no such title as will support an action for their recovery, but as soon as the property is consigned and delivered to the carrier or forwarder, the consignee has title thereto, and the consignor would have no right to change the delivery of the goods, or even to exercise the right of stoppage in transitu where the consignee has already made advances for the amount of the proceeds of the goods.⁴⁰

From this it follows that ordinarily a factor has no title in goods consigned to him, except for his commission and advances, and has no power to control the principal's title over them,⁴¹ as the title is in the latter.⁴² Nor can the principal's title be divested by the factor transferring the goods to pay a private debt.⁴³ The goods may be seized by a creditor of the consignor before they reach the consignee, but an attachment or levy of execution upon the goods

³⁸ *Brooks v. Hanover Nat. Bank*, 26 Fed. 301; *Weed v. Conn.* 378; *Nelson v. Chicago, B. & Q. R. Co.*, 2 Ill. App. v. Hiller, 52 Miss. 7; *Moore v. Hillabrand*, 16 Abb. 1477; *Beebe v. Mead*, 33 N. Y. 587; *Heard v. Brewer*, 4136; *Beadles v. Hartmus*, 7 Baxt. (Tenn.) 476. But not if there is an actual delivery. *Brown v. Wiggin*, 16 N. H. 303, regarded as a purchaser for value, in *Hall v. Hinks*, 21 M.

³⁹ *McCurdy v. Brown*, 1 Duer (N. Y.) 101.

⁴⁰ *Stafford v. Webb*, Hill & D. Supp. (N. Y.) 213; *Rafael Arroyo*, Fed. Cas. No. 17,621; *Ruhl v. Corner*, 179.

⁴¹ *Walter v. Ross*, 2 Wash. C. C. 283, Fed. Cas. No. 17,122; *Bonner v. Marsh*, 10 Smedes & M. (Miss.) 376, 48 Am. Dec. 754; *Rochester v. Jones*, 4 N. Y. 497, 55 Am. Dec. 290; *Ogdon v. Smith*, 2 E. D. Smith (N. Y.) 317; *Beadles v. Hartmus*, 7476.

⁴² *Sturm v. Boker*, 150 U. S. 312; *Walter v. Ross*, 283, Fed. Cas. No. 17,122; *Bonner v. Marsh*, 10 Smedes & M. 376, 48 Am. Dec. 754; *Benny v. Rhodes*, 18 Mo. 147, 59 Am. Dec. 293; *Bank of Rochester v. Jones*, 4 N. Y. 497, 55 Am. Dec. 290; *County Nat. Bank v. Daniels*, 47 N. Y. 631.

⁴³ *Benny v. Rhodes*, 18 Mo. 147, 59 Am. Dec. 293. S.

⁴⁴ *Bonner v. Marsh*, 10 Smedes & M. (Miss.) 376, 48

proceeds, cannot be made by the creditors of the factor.⁴⁵ If the goods were destroyed while in the factor's possession, he could not sue for their value for the benefit of the principal;⁴⁶ although he could sue for damages to the amount of his lien for charges, etc.⁴⁷

§ 829. When title vests in factor for purposes of sale.

In order that a factor may make a perfect sale of goods, consigned to him, to a third party, it is necessary that he should have such a title therein as to be able to pass a good title to the purchaser. The question now arises as to when the factor acquires such a title. The mere fact that the goods have been shipped to him will not, of itself, vest title in him, although he should be a purchaser, as there may be some unperformed conditions or other circumstances that may induce the consignor to keep the final appointment of the shipment in his own hands.⁴⁸ But in order that the factor may have such a title to the goods, or any other interests or rights, as factor, therein, it is necessary that he should accept the consignment on the terms on which it was made or upon such other terms as may be agreed upon by the consignor. Until he does so he can receive no benefit from,⁴⁹ nor incur any liability,⁵⁰ in reference to such goods. A factor who does not accept the terms on which a consignment to him is made cannot resist such other disposal of the goods as the consignor may make.⁵¹ Thus, if a factor's in-

⁴⁵ *McCullough v. Porter*, 4 Watts & S. (Pa.) 177, 39 Am. Dec. 68; *Ellsner v. Radcliff*, 21 Ill. App. 195; *W. O. Dean Co. v. Lombard*, 61 Ill. App. 94; *Berry v. Allen*, 59 Ill. App. 149; *Gray v. Agnew*, 95 Ill. 315; *Blood v. Palmer*, 11 Me. 414, 26 Am. Dec. 547; *Holly v. Huggeford*, 8 Pick. (Mass.) 73, 19 Am. Dec. 303; *National Cordage Co. v. Sims*, 44 Neb. 148; *Barnard v. Kobbe*, 54 N. Y. 516; *Moore v. Hilla-brand*, 37 Hun (N. Y.) 491; *Barnes Safe & Lock Co. v. Bloch Bros. Tobacco Co.*, 38 W. Va. 158, 45 Am. St. Rep. 846.

⁴⁶ *Stone v. City of New York*, 25 Wend. (N. Y.) 157; *City of New York v. Stone*, 20 Wend. (N. Y.) 139.

⁴⁷ *Stone v. City of New York*, 25 Wend. (N. Y.) 157; *City of New York v. Stone*, 20 Wend. (N. Y.) 139.

⁴⁸ *Steamboat John Owen v. Johnson*, 2 Ohio St. 142.

⁴⁹ *Bank of Rochester v. Jones*, 4 N. Y. 497, 55 Am. Dec. 290.

⁵⁰ *Du Peirat v. Wolfe*, 29 N. Y. 436.

⁵¹ *Winter v. Colt*, 7 N. Y. 288, 57 Am. Dec. 522.

terest in goods is made conditional on his acceptance of a draft drawn on him by the consignor and general agent; he would acquire no title to such goods until he has accepted such draft.⁵² After acceptance, he is bound by the orders prescribed by the shipper, and cannot refuse to obey the orders which accompany the consignment.⁵³ His acceptance, however, does not affect the consignee's title in the property consigned; it merely determines the rights and liabilities in reference thereto, and gives the factor sufficient title to sell to third persons, for until the goods are sold by the factor in accordance with the terms of the consignment, the consignor retains title and may recover upon paying to the factor any advances or expenses incurred by him.⁵⁴

§ 830. Implied powers—In general.

In the absence of express instructions to the factor, like other agents, has implied power to do those acts that are reasonably necessary and incidental to the performance of the undertaking upon which he is employed, and which are usually done in like or similar cases. These powers are to be determined according to the custom of the place where the sale or contract of disposition is made. Of course, as far as third parties are concerned, the authority of a factor, acting in the line of his employment, is not to be limited by private instructions not made known to the party dealing with him.⁵⁵ Strangers can only be bound by the acts of the parties, and to the external indicia of authority.

⁵² *Bank of Rochester v. Jones*, 4 N. Y. 497, 55 Am. Dec. 101.

⁵³ *Loralne v. Cartwright*, 3 Wash. C. C. 151, Fed. Cas. No. 17,086; *Walker v. Smith*, 4 Dall. 389, Fed. Cas. No. 17,086; *Walker v. Smith*, 37 Conn. 378; *Cotton v. Hiller*, 52 Miss. 7; *Beadles v. Baxt.* (Tenn.) 476.

⁵⁴ *Nesmith v. Dyeing, B. & C. Co.*, 1 Curt. 130, Fed. Cas. No. 10,100; *Chaffe v. Heyner*, 31 La. Ann. 594; *McDonald-Crowley-Johnson Mission Co. v. Boggs*, 78 Mo. App. 28; *Cameron v. Crockett*, 100 N. Y. 391; *Baker v. New York Nat. Exch. Bank*, 100 N. Y. 31; *Duguid v. Edwards*, 50 Barb. (N. Y.) 297; *Soria v. New York Super. Ct.* 470; *Moore v. Hillabrand*, 37 Hun (N. Y.) 470.

⁵⁵ *Frank v. Jenkins*, 22 Ohio St. 597; *Harbert v. Neill*, 100 N. Y. 391.

⁵⁶ *Lobdell v. Baker*, 1 Metc. (Mass.) 193, 35 Am. Dec. 101.

erty, and not to the private communications which may pass between a principal and his factor; and if a person authorize another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority.⁵⁷

§ 831. To sell in his own name.

Inasmuch as a factor has a special property in goods consigned to him, he has, in the absence of express instructions or usage to the contrary, the authority to sell the goods in his own name, as well as in the name of his principal, although the principal is undisclosed.⁵⁸ As has been said: "The ordinary course of business is for factors to sell in their own name. Now, the rule of law is that the extent of an agent's authority as between himself and third parties is to be measured by the extent of his usual employment. That being so, the very fact of entrusting your goods to a man as a factor, with right to sell them, is *prima facie* authority from you to him to sell in his own name."⁵⁹

§ 832. To sell on credit.

In some jurisdictions, it has been held that in the absence of instructions permitting a factor to sell on credit, he should sell for cash only,⁶⁰ but upon the principle that where one is employed to do a certain thing he is impliedly authorized to do it in the customary manner, the authorities now seem to be well settled that in the absence of express instructions or usage to the contrary the factor may, in the exercise of due care, either sell for cash or upon a reasonable or the customary credit of the place where the sale is made,⁶¹ pro-

⁵⁷ *Pickering v. Busk*, 15 East, 38.

⁵⁸ *Baring v. Corrie*, 2 Barn. & Ald. 137; *Ex parte Dixon*, 4 Ch. Div. 133; *Johnston v. Osborne*, 11 Adol. & E. 549; *Wheeler v. Reed*, 36 Ill. 81; *Burton v. Goodspeed*, 69 Ill. 238; *Graham v. Duckwall*, 8 Bush (Ky.) 12; *Blood v. Palmer*, 11 Me. 414, 26 Am. Dec. 547; *Miller v. Lea*, 35 Md. 396, 6 Am. Rep. 417; *Baxter v. Sherman*, 73 Minn. 434, 72 Am. St. Rep. 631; *Campbell v. Reeves*, 3 Head (Tenn.) 226.

⁵⁹ *Ex parte Dixon*, 4 Ch. Div. 133, 137.

⁶⁰ *Babcock v. Orblison*, 25 Ind. 75; *Furth v. Miller's Ex'r*, 67 Mo. App. 241.

⁶¹ *Anon.*, 12 Mod. 514; *Houghton v. Matthews*, 3 Bos. & P. 485;

vided he does not unreasonably extend the term of credit, and uses due diligence to ascertain the solvency of the purchaser.⁶² He is not authorized to give credit, except to such persons as prudent people would trust with their own property. If in so selling he sells to one who is solvent at the time of sale, but who afterwards becomes insolvent, the factor will not be liable for the ensuing loss.⁶³ But if through carelessness, or want of proper examination and inquiry, he gives credit to a man who is insolvent, and a loss happens, he must indemnify the principal.⁶⁴

If, however, there is a usage to sell for cash only, the factor cannot sell on credit, without express instructions to that effect.⁶⁵ Or if he is expressly instructed to sell for

Russell v. Hankey, 6 Term R. 12; Forrester v. Bordman, 1 Story, 43, Fed. Cas. No. 4,945; Burton v. Goodspeed, 69 Ill. 237; M. M. Walker Co. v. Dubuque Fruit & Produce Co., 106 Iowa, 245, 113 Iowa, 428; Byrne v. Schwing, 6 B. Mon. (Ky.) 199; De Lazard v. Hewitt, 7 B. Mon. (Ky.) 697; Reano v. Mager, 11 Mart. (O. S., La.) 637; Pinkham v. Crocker, 77 Me. 563; Greely v. Bartlett, 1 Me. 172, 10 Am. Dec. 54; Goodenow v. Tyler, 7 Mass. 36, 5 Am. Dec. 22; Hapgood v. Batcheller, 4 Metc. (Mass.) 573; Dwight v. Whitney, 15 Pick. (Mass.) 179; Daylight Burner Co. v. Odlin, 51 N. H. 56, 12 Am. Rep. 45; Huffcut, Cas. 208; Van Alen v. Vanderpool, 6 Johns. (N. Y.) 69, 5 Am. Dec. 192; Robertson v. Livingston, 5 Cow. (N. Y.) 473; Leland v. Douglass, 1 Wend. (N. Y.) 490; Leverick v. Meigs, 1 Cow. (N. Y.) 645; Laussatt v. Lippincott, 6 Serg. & R. (Pa.) 386, 9 Am. Dec. 440; Percival v. Cooper, 6 Phila. (Pa.) 48; James v. McCredie, 1 Bay (S. C.) 294, 1 Am. Dec. 617; May v. Mitchell, 5 Humph. (Tenn.) 365; McConnico v. Curzen, 2 Call (Va.) 358, 1 Am. Dec. 540.

⁶² Van Alen v. Vanderpool, 6 Johns. (N. Y.) 69, 5 Am. Dec. 192; Forrester v. Bordman, 1 Story, 43, Fed. Cas. No. 4,945; M. M. Walker Co. v. Dubuque Fruit & Produce Co., 113 Iowa, 428; and see cases cited in preceding note.

⁶³ Forrester v. Bordman, 1 Story, 43, Fed. Cas. No. 4,945; Durant v. Fish, 40 Iowa, 559; De Lazard v. Hewitt, 46 Ky. 697; Fisk v. Offit, 3 Mart. (N. S., La.) 553; Greely v. Bartlett, 1 Me. 172, 10 Am. Dec. 54; Goodenow v. Tyler, 7 Mass. 36, 5 Am. Dec. 22; Dwight v. Whitney, 15 Pick. (Mass.) 179; James v. McCredie, 1 Bay (S. C.) 294, 1 Am. Dec. 617; Howatt v. Davis, 5 Munf. (Va.) 34, 7 Am. Dec. 681.

⁶⁴ Greely v. Bartlett, 1 Me. 172, 10 Am. Dec. 54, 57.

⁶⁵ Harbert v. Neill, 49 Tex. 143; Neill v. Billingsley, 49 Tex. 161;

cash he cannot sell on credit;⁶⁶ nor can he plead a usage in defense of such a sale.⁶⁷ By a sale for cash is meant one where the money is paid upon the delivery of the property, and it is wholly inconsistent to claim that it means by usage a sale on a short credit.⁶⁸ A credit sale by a factor, without authority to sell on credit, will be considered with regard to the rights of the consignor as having been for cash, and the factor is liable to the consignor as for money had and received.⁶⁹⁻⁷¹

§ 833. To receive payment.

(a) **In general.**—As a factor has in his possession the goods which he is employed to sell, or the indicia of title thereto, and has the implied authority to sell them in his own name, it follows that he has the implied power to receive payment for goods so sold, at the time he sells and delivers the property, or the indicia of title thereto, or subsequently if sold on credit, and his receipt would be a discharge of the purchaser.⁷²

Kauffman v. Beasley, 54 Tex. 563; *Burton v. Goodspeed*, 69 Ill. 237. And see *Daylight Burner Co. v. Odlin*, 51 N. H. 56, 12 Am. Rep. 45, *Huffcut*, Cas. 209.

⁶⁶ *Barksdale v. Brown*, 1 Nott. & McC. (S. C.) 517, 9 Am. Dec. 720; *Walker v. Smith*, 1 Wash. C. C. 152, Fed. Cas. No. 17,086; *Johnson v. Totten*, 3 Cal. 343, 58 Am. Dec. 412; *Montgomery v. Wood*, 4 La. Ann. 298; *Bonham v. Overton*, 6 La. Ann. 765; *Dodge v. Tilleston*, 12 Pick. (Mass.) 328; *Bliss v. Arnold*, 8 Vt. 252, 30 Am. Dec. 467; *Catlin v. Smith*, 24 Vt. 85; *Chapman v. Devereux*, 32 Vt. 616; *Hall v. Storrs*, 7 Wis. 253.

⁶⁷ *Barksdale v. Brown*, 1 Nott. & McC. (S. C.) 517, 9 Am. Dec. 720; *Geyer v. Decker*, 1 Yeates (Pa.) 486; *Bliss v. Arnold*, 8 Vt. 252, 30 Am. Dec. 467; *Hall v. Storrs*, 7 Wis. 253, 260. But see *Clark v. Van Northwick*, 1 Pick. (Mass.) 343.

⁶⁸ *Bliss v. Arnold*, 8 Vt. 252, 30 Am. Dec. 467; *Barksdale v. Brown*, 1 Nott. & McC. (S. C.) 517, 9 Am. Dec. 720; *Catlin v. Smith*, 24 Vt. 85. But see *Clark v. Van Northwick*, 1 Pick. (Mass.) 343.

⁶⁹⁻⁷¹ *Johnson v. Totten*, 3 Cal. 343, 58 Am. Dec. 412. See *Furth v. Miller's Ex'x*, 67 Mo. App. 241.

⁷² *Drinkwater v. Goodwin*, Cowp. 251; *Coates v. Lewes*, 1 Camp. 444; *Pickering v. Busk*, 15 East, 38; *Adams v. Fraser*, 82 Fed. 211; *Kane v. Barstow*, 42 Kan. 465, 16 Am. St. Rep. 490; *Graham v. Duckwall*, 8 Bush (Ky.) 12; *Traub v. Milliken*, 57 Me. 63, 2 Am. Rep. 14; *Van Staphorst v. Pearce*, 4 Mass. 258; *West Boylston Mfg. Co. v.*

(b) **In money.**—As a general rule a factor has no implied power to receive in payment of goods, sold by him for his principal, anything but lawful money. He has no implied power to receive in payment depreciated paper or currency of any kind, nor goods, nor anything but lawful money, and if he does so he will be liable to the principal for the proceeds of the sale in legal currency.⁷³ Where, however, extraordinary circumstances arise, and he acts in good faith and receives in payment what is usually received by others in his line of business at the time, he would not be liable for any loss that might arise by reason of his not having received money.⁷⁴

(c) **In negotiable paper.**—Where the factor sells his principal's goods on credit, and he exercises due prudence and skill, he may take the purchaser's negotiable paper, payable to himself, in payment without rendering himself responsible in case of the maker's subsequent insolvency.⁷⁵ A factor

Searle, 15 Pick. (Mass.) 225; Butler v. Dorman, 68 Mo. 298, 30 Am. Rep. 795; Rice v. Groffmann, 56 Mo. 434; Corlies v. Cumming, 6 Cow. (N. Y.) 181.

⁷³ Greenleaf v. Moody, 13 Allen (Mass.) 363.

⁷⁴ Sangston v. Maitland, 11 Gill & J. (Md.) 286; Underwood v. Nicholls, 17 C. B. 239; Dunnell v. Mason, 1 Story, 543, Fed. Cas. No. 4,179; Thomas v. Thompson, 19 La. Ann. 487; Poindexter v. King, 21 La. Ann. 697.

⁷⁵ Scott v. Surman, Willes, 400; Hamilton v. Cunningham, 2 Brock. 350, Fed. Cas. No. 5,978; Goldthwaite v. McWhorter, 5 Stew. & P. (Ala.) 284; Leach v. Beardslee, 22 Conn. 404; Greely v. Bartlett, 1 Me. 172, 10 Am. Dec. 54; Goodenow v. Tyler, 7 Mass. 36, 5 Am. Dec. 22; West Boylston Mfg. Co. v. Searle, 15 Pick. (Mass.) 225; Gorman v. Wheeler, 10 Gray (Mass.) 362; Corlies v. Cumming, 6 Cow. (N. Y.) 181; McKinstry v. Pearsall, 3 Johns. (N. Y.) 319. But see Brown v. Delk, 132 Pa. 152. In Hapgood v. Batcheller, 4 Metc. (Mass.) 573, Hubbard, J., says: "It is a practice well understood among all persons who consign goods for sale that the commission merchant, for convenience, takes the notes of vendees in his own name, often including the sales for different consignors; and that he holds such notes in trust for his principal." Where a factor takes a promissory note for the payment of goods sold on account of his consignor, and gives him reasonable notice of this and of the subsequent insolvency of the purchaser, he does not by proving the note under the insolvent laws, and taking a dividend thereon, render

may, and often does, sell the goods of different principals in one sale, and has authority to take a note for the whole sum from the purchaser, and may hold the note for the benefit of his principals.⁷⁶ But a factor cannot at the expiration of a credit given take a note payable to himself at a future day; as by so doing, he makes the debt his own.⁷⁷ So a factor who takes notes in his own name for goods of his principal, and discounts them for his own accommodation, makes them his own, and will be liable to the principal for the amount of the sales, in the event of the insolvency of the purchaser.⁷⁸ If the factor was authorized to account for such sales in satisfactory bank notes, the principal is not obliged to accept the notes of third parties, not shown to be either bank notes or satisfactory.⁷⁹

The factor must use due diligence to collect the amount of a note taken by him for goods sold for his principal;⁸⁰ but he will not be liable for a failure to collect the amount in such a case, unless he has become a guarantor of it, or has been guilty of negligence.⁸¹

himself liable for the full amount of the note if he uses reasonable care and skill, although the consignor resides in another state, and his claim against the purchaser, if not proved, would not be barred by the discharge in insolvency. *Gorman v. Wheeler*, 10 Gray (Mass.) 362.

⁷⁶ *Hamilton v. Cunningham*, 2 Brock. 350, Fed. Cas. No. 5,978; *Leach v. Beardslee*, 22 Conn. 404; *Chesterfield Mfg. Co. v. Dehon*, 5 Pick. (Mass.) 7, 16 Am. Dec. 367; *Hapgood v. Batcheller*, 4 Metc. (Mass.) 573; *West Boylston Mfg. Co. v. Searle*, 15 Pick. (Mass.) 225; *Corlies v. Cumming*, 6 Cow. (N. Y.) 181; *Johnson v. O'Hara*, 5 Leigh (Va.) 456.

⁷⁷ *Hosmer v. Beebe*, 2 Mart. (N. S.; La.) 368; *Richardson v. Weston*, 4 Mart. (N. S.; La.) 244.

⁷⁸ *Myers v. Entriken*, 6 Watts & S. (Pa.) 44, 40 Am. Dec. 538; *Morris v. Wallace*, 3 Pa. 323; *Johnson v. O'Hara*, 5 Leigh (Va.) 456; *Byrne v. Schwing*, 6 B. Mon. (Ky.) 199; *Porter v. Zeitinger*, 1 Penny. (Pa.) 505; *Brown v. Delk*, 132 Pa. 152.

⁷⁹ *Childs v. Waterloo Wagon Co.*, 37 App. Div. 242, 167 N. Y. 576.

⁸⁰ *Folsom v. Mussey*, 8 Me. 400, 23 Am. Dec. 522 (and the principal is not bound to give special directions concerning its collection); *Kinney v. Crane*, 17 La. 417; *Skillman v. Leverich*, 11 La. 520.

⁸¹ *Folsom v. Mussey*, 8 Me. 400, 23 Am. Dec. 522.

§ 834. To warrant.

In the absence of express instructions to the contrary, a factor has, by reason of the usages of trade, an implied power to give a warranty of the quality of the goods sold by him for his principal.⁸² He may not, however, warrant that the goods will keep sound under all conditions, as that flour will keep sweet during a sea voyage,⁸³ or unusual warranties of any kind.⁸⁴ So if it is not customary so to warrant and he is not authorized by the principal to do so, the factor is bound to ascertain the character or quality of goods consigned to him, without communication to him from the consignor, as to their character or quality, and to put them upon the market for what they are in that respect. He has, in such cases, no implied power to undertake that the goods are in any respect other than or different from what they really are. And if he goes beyond his authority, and warrants the quality of the goods, the warranty will be his own, and he will be personally liable for its breach.⁸⁵

§ 835. To insure.

Where a factor has the goods, which he is employed to sell for his principal, in his possession, he has the implied power to insure them if he so desires; but there is no obligation upon him to do so, unless he has been expressly instructed to that effect, or unless it is his duty to insure from the usual mode of dealing between him and his principal or by the usages of trade.⁸⁶ And he may effect such insurance either

⁸² *Schuebardt v. Allens*, 1 Wall. (U. S.) 359; *Flash v. American Glucose Co.*, 38 La. Ann. 4; *Randall v. Kehlor*, 60 Me. 37; *Pickert v. Marston*, 68 Wis. 465.

⁸³ *Upton v. Suffolk County Mills*, 11 Cush. (Mass.) 586, 59 Am. Dec. 163.

⁸⁴ He may not warrant that whiskey sold by him would not be seized for a violation of the revenue laws. *Palmer v. Hatch*, 46 Mo. 585.

⁸⁵ *Argersinger v. Macnaughton*, 114 N. Y. 535, 11 Am. St. Rep. 687.

⁸⁶ *Smith v. Lascelles*, 2 Term R. 187; *Waters v. Monarch F. & L. Assur. Co.*, 5 El. & Bl. 870; *Kingston v. Willson*, 4 Wash. C. C. 310, Fed. Cas. No. 7,823; *Odorless Rubber Co. v. North Bennington Boot & Shoe Co.*, Fed. Cas. No. 10,438; *Shoenfeld v. Fleisher*, 73 Ill. 404; *Schaeffer v. Kirk*, 49 Ill. 251; *Fish v. Seeberger*, 154 Ill. 30; *Aetna*

in his own name or in that of his principal, and should the goods be lost, he may recover their full value.⁸⁷ If he insures in his own name, he may, in case of loss, recover of the underwriters the whole amount of the value of the property insured; and the surplus beyond his own interest will be a resulting trust for the benefit of his principal.⁸⁸ If, in the cases above mentioned, a factor is authorized to insure his principal's goods, he should use a reasonable degree of diligence and skill in so doing, and if he fails to do so, he will himself be liable as insurer, in case of loss, in which event he will be entitled to credit for premiums which should have been paid.⁸⁹

Ins. Co. v. Jackson, 16 B. Mon. (Ky.) 242; *Duncan v. Boye*, 17 La. Ann. 273; *Tonge v. Kennett*, 10 La. Ann. 800; *Area v. Milliken*, 35 La. Ann. 1150; *Gordon v. Wright*, 29 La. Ann. 812; *Johnson v. Campbell*, 120 Mass. 449; *Burbridge v. Gumbel*, 72 Miss. 371; *Thorne v. Deas*, 4 Johns. (N. Y.) 84; *De Forest v. Fulton F. Ins. Co.*, 1 Hall (N. Y.) 84; *Lee v. Adsit*, 37 N. Y. 78; *Beardsley v. Davis*, 52 Barb. (N. Y.) 159.

"It is not denied that a factor has a special property in the goods held by him on consignment for sale and may maintain trover for them if wrongfully withheld from him. And that species of ownership is vested in him, I apprehend, by the consignment itself, notwithstanding that there should not be any bill of lading or other formal transfer in writing to vest the legal title in him. And it would be strange that an interest which authorizes an action for the goods as his own should not be capable of being insured, or that the duty of guarding the property from danger should not give the corresponding right to insure it." By Jones, C. J., in *De Forest v. Fulton F. Ins. Co.*, 1 Hall (N. Y.) 84, 110.

⁸⁷ *Brisban v. Boyd*, 4 Paige (N. Y.) 17; *De Forest v. Fulton F. Ins. Co.*, 1 Hall (N. Y.) 84; *Aetna Ins. Co. v. Jackson*, 16 B. Mon. (Ky.) 242, and see cases cited in preceding note. A factor who has insured his principal's goods at the latter's expense, and collected the insurance on their being damaged by fire while in his possession, is liable to his principal for the amount collected, with interest from the time payment is demanded of him, even though there is no contract between them as to insurance. *Fish v. Seeberger*, 154 Ill. 30.

⁸⁸ *Story, Sales* (3d Ed.) § 102a; *Aetna Ins. Co. v. Jackson*, 16 B. Mon. (Ky.) 242; *Waters v. Monarch F. & L. Assur. Co.*, 5 El. & Bl. 870.

⁸⁹ *De Tastett v. Crousillat*, 2 Wash. C. C. 132, Fed. Cas. No. 3,828; *Shoenfeld v. Fleisher*, 73 Ill. 404; *Gordon v. Wright*, 29 La. Ann.

§ 836. To barter or exchange.

A factor's authority is limited to selling, and therefore he has no power to barter or exchange his principal's goods. If he should do so, no title is passed thereby, and the principal may maintain an action of trover against the person to whom the goods are bartered, although the latter has dealt in good faith and in ignorance of the true owner's title.⁹⁰

§ 837. Power to pledge at common law.

(a) **In general.**—Although it was for a long time a subject of doubt, it seems now to be well settled that, at common law, a factor cannot pledge the goods which the principal has placed in his possession for sale, although the factor has made advances to his principal upon such goods, and has a lien thereon for such advances; and though there is the formality of a bill of parcels and a receipt. By such a pledge the pledgee would acquire no interest in the goods as against the principal, and it is immaterial whether he had notice that the factor was acting as such or not.⁹¹ Nor can he pledge by the

812; *Thorne v. Deas*, 4 Johns. (N. Y.) 84; *Kingston v. Wilson*, 4 Wash. C. C. 310, Fed. Cas. No. 7,823.

⁹⁰ *Guerreiro v. Pelle*, 3 Barn. & Ald. 616, Wamb. Cas. 282; *Potter v. Dennison*, 10 Ill. 590; *Hampton v. Moorhead*, 62 Iowa, 91; *Haas v. Damon*, 9 Iowa, 589; *Wing v. Neal* (Me.) 2 Atl. 881; *Kent v. Bornstein*, 12 Allen (Mass.) 342; *Trudo v. Anderson*, 10 Mich. 357, 81 Am. Dec. 795; *Wheeler & W. Mfg. Co. v. Givan*, 65 Mo. 89; *Benny v. Rhodes*, 18 Mo. 147, 59 Am. Dec. 294; *Holton v. Smith*, 7 N. H. 446; *Grover v. Clark*, *Wright* (Ohio) 350; *Kauffman v. Beasley*, 54 Tex. 563; *Victor Sewing Mach. Co. v. Heller*, 44 Wis. 265.

⁹¹ *England*: *Paterson v. Tash*, 2 Strange, 1178; *Daubigny v. Duval*, 5 Term R. 604; *Martini v. Coles*, 1 Maule & S. 140; *Boyson v. Coles*, 6 Maule & S. 14; *Pickering v. Busk*, 15 East, 38. As has been said: "It is manifest that when a man is dealing with other people's goods, the difference between an authority to sell and an authority to mortgage or pledge is one which may go to the root of all the motives and purposes of the transaction. The object of a person who has goods to sell is to turn them into money, but when those goods are deposited by way of security for money borrowed, it is a transaction of a totally different character. If the owner of the goods does not get the money, his object and purpose are simply defeated; and if, on the other hand, he does get the money, a different object and different purpose are substituted for

indorsement and delivery of a bill of lading, any more than by the delivery of the goods themselves,⁹² and a usage permitting

the first, namely, that of borrowing money and contracting the relation of debtor with a creditor while retaining a redeemable title to the goods instead of exchanging the title to the goods for a title unaccompanied by any indebtedness to their full equivalent in money." By Lord Chancellor Selborne, in *City Bank v. Barrow*, 5 App. Cas. 664, 670.

United States: *Warner v. Martin*, 11 How. 209; *Van Amringe v. Peabody*, 1 Mason, 440, Fed. Cas. No. 16,825; *Allen v. St. Louis Bank*, 120 U. S. 20; *Halsey v. Bird*, 99 Fed. 525; *Mechanics' & T. Ins. Co. v. Kiger*, 103 U. S. 352.

Alabama: *Bott v. McCoy*, 20 Ala. 578, 56 Am. Dec. 223; *Commercial Bank of Selma v. Hurt*, 99 Ala. 130, 42 Am. St. Rep. 38; *Voss v. Robertson*, 46 Ala. 483.

California: *Wright v. Solomon*, 19 Cal. 64, 79 Am. Dec. 196; *Chase v. Whitmore*, 68 Cal. 547; *Robinson v. Nevada Bank*, 81 Cal. 106. Rule applies only to technical factors. *Horr v. Barker*, 11 Cal. 393, 70 Am. Dec. 791; *Hutchinson v. Bours*, 6 Cal. 383.

Connecticut: *Terry v. Bamberger*, 44 Conn. 561.

Georgia: *First Nat. Bank of Macon v. Nelson*, 38 Ga. 391, 95 Am. Dec. 400; *National Exch. Bank v. Graniteville Mfg. Co.*, 79 Ga. 22.

Illinois: *Gray v. Agnew*, 95 Ill. 315; *Berry v. Allen*, 59 Ill. App. 149; *Elgin First Nat. Bank v. Schween*, 127 Ill. 573; *Trumbull v. Union Trust Co.*, 33 Ill. App. 319.

Kentucky: *First Nat. Bank of Louisville v. Boyce*, 78 Ky. 42, 39 Am. Rep. 198.

Louisiana: *Miller v. Schneider*, 19 La. Ann. 300, 92 Am. Dec. 535; *Lallande v. His Creditors*, 42 La. Ann. 705; *Young v. Scott*, 25 La. Ann. 313; *Holton v. Hubbard*, 49 La. Ann. 715.

Massachusetts: *Kinder v. Shaw*, 2 Mass. 398; *Hoffman v. Noble*, 6 Metc. 68, 39 Am. Dec. 711, 714; *Michigan State Bank v. Gardner*, 15 Gray, 362; *Nowell v. Pratt*, 5 Cush. 111.

Minnesota: *Baxter v. Sherman*, 73 Minn. 434, 72 Am. St. Rep. 631.

Mississippi: *Wesling v. Noonan*, 31 Miss. 599.

Missouri: *Benny v. Rhodes*, 18 Mo. 147, 59 Am. Dec. 293; *Benny v. Pegram*, 18 Mo. 191, 59 Am. Dec. 298; *Wheeler & W. Mfg. Co. v. Givan*, 65 Mo. 89.

New Hampshire: *Martin v. Moulton*, 8 N. H. 504; *Holton v. Smith*, 7 N. H. 446.

New York: *Rodriguez v. Heffernan*, 5 Johns. Ch. 429; *Kennedy v. Strong*, 14 Johns. 128; *Commercial Nat. Bank v. Hellbronner*, 108 N. Y. 439.

North Carolina: *Hoffman v. Kramer*, 123 N. C. 566.

factors to pledge their principal's goods is bad.⁹³ So strictly is this rule applied that it has been held that a request of the consignor accompanying the consignment, that his factor should make remittances in anticipation of sales, does not authorize the factor to pledge the goods to raise money to remit.⁹⁴ The above rule applies, not only to a technical factor whose only business is to sell goods consigned to him, but also to a factor who, at the same time, does business on his own account.⁹⁵ If the pledgee will call for the letter of advice, or make due inquiry as to the source from whence the goods came, he can discover that the possessor held the goods as factor, and not as owner; and he is bound to know, at his peril, the extent of the factor's power.⁹⁶ If he does not make due inquiry, and takes it upon himself to deal with the factor, and advances his money upon such a pledge, he ac-

Oregon: Merchants' Nat. Bank v. Pope, 19 Or. 35.

Pennsylvania: Newbold v. Wright, 4 Rawle, 195; Agnew v. Johnson, 22 Pa. 471, 62 Am. Dec. 303; Macky v. Dillinger, 73 Pa. 85.

South Carolina: Bowie v. Napier, 1 McCord, 1, 10 Am. Dec. 641.

Tennessee: Merchants' Nat. Bank v. Trenholm, 12 Heisk. 520.

Texas: McCreary v. Gaines, 55 Tex. 485, 40 Am. Rep. 818; Wootters v. Kaufman, 73 Tex. 395.

Virginia: Skinner v. Dodge, 4 Hen. & M. 432.

Wisconsin: Victor Sewing Mach. Co. v. Heller, 44 Wis. 265.

⁹² Newson v. Thornton, 6 East, 17; Martini v. Coles, 1 Maule & S. 140; Phillips v. Huth, 6 Mees. & W. 572; Allen v. St. Louis Bank, 120 U. S. 20; Lallande v. His Creditors, 42 La. Ann. 705; Rice v. Cutler, 17 Wis. 351. Compare Hirschorn v. Canney, 98 Mass. 149; Fourth Nat. Bank v. St. Louis C. C. Co., 11 Mo. App. 333.

⁹³ Newbold v. Wright, 4 Rawle (Pa.) 195.

⁹⁴ Queiroz v. Trueman, 3 Barn. & C. 342.

⁹⁵ Wright v. Solomon, 19 Cal. 64, 79 Am. Dec. 196. This case overrules Hutchinson v. Bours, 6 Cal. 385, Glidden v. Lucas, 7 Cal. 26, and Horr v. Barker, 11 Cal. 393, 70 Am. Dec. 791, limiting the rule to a technical factor.

⁹⁶ See Daubigny v. Duval, 5 Term R. 604; McCombie v. Davies, 6 East, 538, 7 East, 5; Pickering v. Busk, 15 East, 38; Warner v. Martin, 11 How. (U. S.) 224; Wright v. Solomon, 19 Cal. 64, 79 Am. Dec. 196, 199; Kinder v. Shaw, 2 Mass. 398; Benny v. Rhodes, 18 Mo. 147, 59 Am. Dec. 293; Holton v. Smith, 7 N. H. 446; Buckley v. Packard, 20 Johns. (N. Y.) 421; Stevens v. Wilson, 3 Denio (N. Y.) 476; Skinner v. Dodge, 4 Hen. & M. (Va.) 432; Hewes v. Doddridge, 1 Rob. (Va.) 143.

quires no title to the property as against the principal; nor is it material in such a case whether or not the pledgee knew that he was dealing with a factor.⁹⁷

(b) **Modifications.**—It is held, however, that the factor can pledge the principal's goods for the payment of duties or other charges accruing on the specific goods,⁹⁸ or to the extent of his own lien or interest,⁹⁹ or he may pledge them to pay off a draft drawn on the proceeds thereof, by the principal.¹⁰⁰ Thus, when a factor pledges the property of his principal or the warehouse receipts therefor without authority, a clause in the contract of pledge that the property "has been advanced upon by us to its full value" limits the operation of the pledge to the factor's actual interest in the property, but does not divest the title of the real owner as against the pledgee.¹⁰¹ So if the factor purchases the goods in his own name he may pledge them.¹⁰² A factor may also pledge negotiable paper as a security for his own debt, and thereby bind his principal, unless the latter can charge the party receiving it with notice of the fraud, or of the want of title; for, from reasons of public policy, the mere possession of negotiable paper carries with it an imperative presumption of title and power of disposal.¹⁰³ So where goods are entrusted to a merchandise

⁹⁷ *Bott v. McCoy*, 20 Ala. 578, 56 Am. Dec. 223; *Commercial Bank v. Hurt*, 99 Ala. 130, 42 Am. St. Rep. 38; *Voss v. Robertson*, 46 Ala. 483; *Benny v. Rhodes*, 18 Mo. 147, 59 Am. Dec. 293; *Benny v. Pegram*, 18 Mo. 191, 59 Am. Dec. 298; *Allen v. St. Louis Bank*, 120 U. S. 20; and see cases cited in preceding notes.

⁹⁸ *Evans v. Potter*, 2 Gall. 12, Fed. Cas. No. 4,569.

⁹⁹ *Warner v. Martin*, 11 How. (U. S.) 209; *Mechanics' & T. Ins. Co. v. Kiger*, 103 U. S. 352; *Steiger v. Third Nat. Bank*, 6 Fed. 569; *Halsey v. Bird*, 99 Fed. 525; *Silverman v. Bush*, 16 Ill. App. 437; *Ludden v. Buffalo Batting Co.*, 22 Ill. App. 415; *First Nat. Bank v. Boyce*, 78 Ky. 42, 39 Am. Rep. 198; *Chambers v. Hubbard*, 51 La. Ann. 887; *Merchants' Nat. Bank v. Pope*, 19 Or. 35. Provided he retains power to control the sale. *Blair v. Childs*, 10 Heisk. (Tenn.) 199. But see *Merchants' Nat. Bank v. Trenholm*, 12 Heisk. (Tenn.) 520.

¹⁰⁰ *Boyce v. Commercial Bank*, 22 Fed. 53; *Citizens' State Bank v. Abbott*, 80 Iowa, 646.

¹⁰¹ *Commercial Bank v. Hurt*, 99 Ala. 130, 42 Am. St. Rep. 38.

¹⁰² *Leet v. Wadsworth*, 5 Cal. 404.

¹⁰³ *Collins v. Martin*, 1 Bos. & P. 648; *Treuttel v. Barandon*, 8 Taunt. 100.

broker to sell, he may, in accordance with a usage, deposit them with a commission merchant, connected with an auctioneer, taking his notes for them;¹⁰⁴ but if the factor should place the goods in the hands of the auctioneer for any other purpose than that of sale, and he should advance money on them as a pledge, the transaction would be invalid.¹⁰⁵

Though the factor cannot pledge the goods of his principal as his own, he may deliver them to a third person as security, with notice of his lien, and as his agent to keep the possession for him, in order to preserve that lien, for this is in effect a continuance of the factor's possession, and does not divest him of his right.¹⁰⁶

(c) **Disaffirmance.**—A factor cannot disaffirm his own tortious act in pledging the goods of his principal. The violation of his authority is injurious to the principal alone, and he may ratify or confirm the act at his pleasure,¹⁰⁷ but the factor is estopped by his act, and cannot be allowed to allege his own violation of authority to set aside the transfer or recover the goods.¹⁰⁸ Nor can he subsequently sell goods and enable the vendees to set aside the contract of pledge, where such contract

¹⁰⁴ *Laussatt v. Lippincott*, 6 Serg. & R. (Pa.) 386, 9 Am. Dec. 440. In this case the court by Tilghman, C. J., says: "That a factor cannot pledge the goods of his principal for his own debt, seems to be too well settled to admit of dispute. That perhaps it would have been as well if the law had originally been decided otherwise; for certainly it bears extremely hard upon persons who deal with a factor, without a possibility of knowing that the goods do not belong to him. It would seem reasonable that the loss should fall on him who puts it in the power of the factor to deceive innocent persons, who deal with him bona fide, and on valuable consideration. And there certainly is some inconsistency in the law which declares that a factor cannot pledge the goods of his principal, and yet permits a purchaser, who buys the goods supposing them to be the property of the factor, to set off a debt due from the factor himself; for the principle of caveat emptor, which avoids the pledge, would forbid the set-off."

¹⁰⁵ *Martini v. Coles*, 1 Maule & S. 140.

¹⁰⁶ *Urquhart v. McIver*, 4 Johns. (N. Y.) 103; *McComble v. Davies*, 7 East, 5. See *Warner v. Martin*, 11 How. (U. S.) 225.

¹⁰⁷ *Bott v. McCoy*, 20 Ala. 578, 56 Am. Dec. 223.

¹⁰⁸ *Bott v. McCoy*, 20 Ala. 578, 56 Am. Dec. 223.

has not been disaffirmed by the principal.¹⁰⁹ But the principal by receiving money arising from sale of goods by his factor, the factor having previously pledged the goods without authority, will not be regarded as a confirmation of the sale and as a disaffirmance of the pledge if the principal was ignorant of the source from which the money came at the time he received it.¹¹⁰

§ 838. Power to pledge under the statutes.

(a) **Factor's act.**—The common-law rule, heretofore discussed, oftentimes worked great hardships on innocent parties who dealt with the factor, relying on his apparent ownership from having the goods or indicia of title in his possession, and such persons not being able to find out whether or not he was acting as factor. By reason of the frauds and hardships thus made possible, and the legislatures, in England and in some States of this country, deeming it better that of two innocent parties, that one should suffer who had enabled the wrongdoer to commit the wrong, enacted for the relief and protection of such innocent third parties, what are known as the "Factor's Acts." The first of the acts was passed in England in 4 Geo. IV., c. 83, which has been subsequently re-enacted in amended form, in 6 Geo. IV., c. 94; 5 & 6 Vict., c. 39; 40 & 41 Vict., c. 39, and 52 & 53 Vict., c. 45. The first in this country was the New York Factor's act (1830, c. 179), which has been followed, in effect, by various other states of the Union. It will be impossible to discuss these statutes to their full extent, but the various statutes and the cases bearing on the same will be given in the appended note.¹¹¹

¹⁰⁹ *Bott v. McCoy*, 20 Ala. 578, 56 Am. Dec. 223.

¹¹⁰ *Bott v. McCoy*, 20 Ala. 578, 56 Am. Dec. 223.

¹¹¹ *England*: 52 & 53 Vict. c. 45. This act provides: "Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this act, be as valid as if he were expressly authorized by the owner of the goods to make the same; provided that the person taking under the disposition acts in good

(b) **Purpose of these acts.**—It has been said that in the passing of the factor's acts, it was clear that the factor or agent for sale had no power to pledge. He was in possession either of the goods themselves or a symbol of the goods, and even though the symbol

was a symbol, and has not at the time of the disposition the person making the disposition has not authority to pledge, etc. *Cole v. North Western Bank*, L. R. 9 C. P. 354; *Jewan v. Whitworth*, L. R. 2 Eq. 692; *Narrington v. Rigg*, 2 De Gex, M. & G. 441. But this statute does not protect pledges made by factors to protect antecedent actual advance was made at the time of the pledge. *Robinson*, 12 Mees. & W. 745; *Macnee v. Gorst*; *Portalis v. Tetley*, L. R. 5 Eq. 140.

California: Civ. Code, §§ 2368, 2369; *Dodge v. Dodge*, 429.

Kentucky: Laws May 5, 1880, §§ 1, 6.

Louisiana: Act 1874, No. 66; Rev. St. 1897, p. 1184; *Howell*, 33 La. Ann. 1184; *Chambers v. Hubbard*; *Mechanics' & T. Ins. Co. v. Kiger*, 103 U. S. 352.

Maryland: Rev. Code 1878, pp. 291, 292, §§ 3, 4; 1 Pub. G. L. p. 4, § 3; p. 5, §§ 5, 6; p. 7, § 13.

Maine: Rev. St. 1883, c. 31.

Missouri: Laws 1869, p. 91.

Massachusetts: Gen. St. 1860, c. 54; Pub. St. 1892, c. 68; *Goodwin v. Massachusetts L. & S. Bank*, 189; *Cairns v. Page*, 165 Mass. 552; *H. A. Prentiss*, 276 Mass. 276.

New York: Laws 1830, c. 179; 2 Rev. St. 1873, c. 179; Rev. St. 1882, p. 2257; 2 Rev. St. 1896, p. 1239; *Bank of Toledo v. Shaw*, 61 N. Y. 283; *Kinsey v. Bank of Toledo*, 337; *Cartwright v. Wilmerding*, 24 N. Y. 521; *J. 20 Wend. 9*; *Stevens v. Wilson*, 6 Hill, 512; *Solomon v. N. Y. 380*, 16 Am. St. Rep. 843; *Foerderer v. Bank*, 107 Fed. 219.

Ohio: 2 Bates' Ann. Rev. St. 1897, §§ 3214-3215; *Shoeman*, 40 Ohio St. 176.

Pennsylvania: Brightly's Purd. Dig. 1873, c. 1873; Purd. Dig. 1894, p. 867; *Macky v. Dillinger*, 73 F. 2d 100.

Rhode Island: Gen. St. 1872, p. 261, c. 123; *P. 1896*, Gen. Laws 1896, c. 158.

Wisconsin: Rev. St. 1898, §§ 3345-3347; *Price v. F. Ins. Co.*, 43 Wis. 267; *Victor Sewing Machine Co. v. Victor*, 265 Wis. 265.

on the face of it some evidence of the property being in himself."¹¹² But although the factor's acts in England and in the several states are not all couched in the same terms, yet the general purpose of them all is the same; and that is to enable third persons to deal with factors who have been entrusted with goods, or with the indicia of title to goods, for sale, as though such factors were the absolute owners of the goods.¹¹³ And if the factor make sufficient delivery of the property or of the indicia of title to it he may make successive pledges of the same property to the extent of its full value.¹¹⁴

(c) **Effect of factor's acts.**—These acts being in derogation of the common law must be strictly construed,¹¹⁵ and the common-law rule still prevails in so far as it has not been changed by the factor's acts; and a factor having the goods of another in his possession, for the purpose of sale, although with the documents of title, cannot, in the absence of statute, pledge them, unless power to that effect has been conferred upon him by the owner.¹¹⁶ By the common-law rule, as has

¹¹² *Phillips v. Huth*, 6 Mees. & W. 572; ante, § 837.

¹¹³ *Allen v. St. Louis Bank*, 120 U. S. 20, 37; *George v. Fourth Nat. Bank*, 41 Fed. 257; *Brooks v. Hanover Nat. Bank*, 26 Fed. 301; *Dodge v. Meyer*, 61 Cal. 405; *Wisp v. Hazard*, 66 Cal. 459; *New York Security & Trust Co. v. Lipman*, 157 N. Y. 551; *Soltau v. Gerdau*, 119 N. Y. 380, 16 Am. St. Rep. 843; *Cartwright v. Wilmerding*, 24 N. Y. 521; *Cleveland v. Shoeman*, 40 Ohio St. 176. "The general rule of law is that, where a person is deceived by another into believing that he may safely deal with property, he bears the loss unless he can show that he was misled by the act of the true owner. The legislature seems to us to have wished to make it the law that where a third person has intrusted goods or the documents of title to goods to an agent who in the course of such agency sells or pledges the goods, he should be deemed by that act to have misled any one who bona fide deals with the agent and makes a purchase from or an advance to him without notice that he was not authorized to sell or to procure the advance." By *Blackburn, J.*, in *Cole v. North Western Bank*, L. R. 10 C. P. 354, 372.

¹¹⁴ *Portalis v. Tetley*, L. R. 5 Eq. 140.

¹¹⁵ *Victor Sewing Mach. Co. v. Heller*, 44 Wis. 265.

¹¹⁶ *Paterson v. Tash*, 2 Strange, 1178; *Lamb v. Attenborough*, 1 Best & S. 831; *Daubigny v. Duval*, 5 Term R. 604; *Barnard v.*

been seen, a factor could not pledge a bill of lading or other document of title of his principal's goods, by indorsement and delivery, although the indorsee did not know that he held them as factor to sell,¹¹⁷ unless the principal had given him authority to deal with them as his own.¹¹⁸ But under the statutes this is different. The effect of these statutes briefly then is to protect innocent third parties who deal with a factor who has the possession of goods, or the documentary evidence of title thereto, for the purpose of a sale, upon the faith of such possession and under the belief that such factor is the owner thereof. And it seems that this rule applies although such third parties know that the factor is an agent, but have no knowledge of a principal, or of the fact that he is unauthorized to sell or pledge, which authority he apparently has.

(d) **Prerequisites.**—Although the factor has power under the statutes to pledge goods in his possession, it is necessary that such goods be in his actual, as distinguished from his constructive, possession;¹¹⁹ that the consignment be made in the factor's name;¹²⁰ and that they be consigned to him for the purpose of sale.¹²¹ Hence, under the statutes, a factor who is

Campbell, 55 N. Y. 456; *First Nat. Bank of Toledo v. Shaw*, 61 N. Y. 283; and cases cited ante, note 111.

¹¹⁷ *Martini v. Coles*, 1 Maule & S. 140; *Newsom v. Thornton*, 6 East, 17; *Guichard v. Morgan*, 4 Moore, 36.

¹¹⁸ *Boyson v. Coles*, 6 Maule & S. 14; *Michigan State Bank v. Gardner*, 15 Gray (Mass.) 362.

¹¹⁹ *Howland v. Woodruff*, 60 N. Y. 73; *Bonito v. Mosquera*, 2 Bosw. (N. Y.) 401; *Stevens v. Wilson*, 6 Hill (N. Y.) 512. A mere consignee who is not a factor, and has not possession of the goods, nor any indicia of title, cannot pledge them. *Chicago Taylor Printing Press Co. v. Lowell*, 60 Cal. 454.

¹²⁰ *Covell v. Hill*, 6 N. Y. 374; *First Nat. Bank of Toledo v. Shaw*, 61 N. Y. 283; *Kinsey v. Leggett*, 71 N. Y. 387; *Bonito v. Mosquera*, 2 Bosw. (N. Y.) 401; *Merchants' & T. Bank v. Farmers' & M. Nat. Bank*, 60 N. Y. 52. Compare *Pegram v. Carson*, 10 Bosw. (N. Y.) 505.

¹²¹ *Cole v. North Western Bank*, L. R. 9 C. P. 470; *Fuentes v. Montis*, L. R. 3 C. P. 268; *Biggs v. Evans* [1894] 1 Q. B. 88; *Brooks v. Hanover Nat. Bank*, 26 Fed. 301; *Stollenwerck v. Thacher*, 115 Mass. 224; *Thacher v. Moors*, 134 Mass. 156; *H. A. Prentice Co. v. Page*, 164 Mass. 276; *Cook v. Beal*, 1 Bosw. (N. Y.) 497; *Moors v.*

not authorized to sell the goods represented by a bill of lading or other document of title cannot pledge them by a transfer of such documentary title.¹²² It is also necessary that such possession be obtained by the factor with the owner's consent,¹²³ and without fraud.¹²⁴ So these statutes only apply where the relation of principal and factor or agent exists between the person having a bill of lading or goods in his possession and the real owner thereof, and where the third person who advanced money to the factor did so on the faith of such bill of lading or goods.¹²⁵

In order for a third person to avail himself of these statutes it is necessary that he should have dealt with the factor in good faith. If he takes a pledge from a factor knowing that the latter is acting contrary to instructions, he is responsible to the principal for a wrongful application of the latter's property.¹²⁶ So one will not be protected by the factor's acts, if he has notice that the factor is not the real owner of

Kidder, 106 N. Y. 32; *Frankinstein v. Thomas*, 4 Daly (N. Y.) 256; *Bonito v. Mosquera*, 2 Bosw. (N. Y.) 401. Authority to sell the goods given to him subsequent to the pledge, without knowledge of the pledge, will not make the pledge valid. *Nickerson v. Darrow*, 5 Allen (Mass.) 419.

¹²² *Stollenwerck v. Thacher*, 115 Mass. 224. See *Steiger v. Third Nat. Bank*, 6 Fed. 569.

¹²³ *Vaughan v. Moffat*, 38 Law J. Ch. 144; *Soltau v. Gerdau*, 119 N. Y. 380, 16 Am. St. Rep. 843; *Hazard v. Fiske*, 18 Hun (N. Y.) 277; *Barnard v. Campbell*, 55 N. Y. 456; *Bonito v. Mosquera*, 2 Bosw. (N. Y.) 401.

¹²⁴ *H. A. Prentice Co. v. Page*, 164 Mass. 276; *Hentz v. Miller*, 94 N. Y. 64; *Soltau v. Gerdau*, 119 N. Y. 380, 16 Am. St. Rep. 843; *Hazard v. Fiske*, 83 N. Y. 287.

¹²⁵ *First Nat. Bank of Toledo v. Shaw*, 61 N. Y. 283; *Howland v. Woodruff*, 60 N. Y. 73; *Stollenwerck v. Thacher*, 115 Mass. 224; *Thacher v. Moors*, 134 Mass. 156; *George v. Fourth Nat. Bank*, 41 Fed. 257.

¹²⁶ *Phillips v. Huth*, 6 Mees. & W. 572; *Hutchinson v. Bours*, 6 Cal. 383; *Levi v. Booth*, 58 Md. 305, 42 Am. Rep. 332; *St. Louis Nat. Bank v. Ross*, 9 Mo. App. 399; *Covell v. Hill*, 6 N. Y. 374; *Wilson v. Nason*, 4 Bosw. (N. Y.) 155; *Stevens v. Wilson*, 6 Hill (N. Y.) 512; *Cleveland v. Shoeman*, 40 Ohio St. 176; *Macky v. Dillinger*, 73 Pa. 85; *Henry v. Philadelphia Warehouse Co.*, 81 Pa. 76; *Price v. Wisconsin M. & F. Ins. Co.*, 43 Wis. 267.

the goods, or if he has knowledge of such circumstances from which he ought to have known that the factor was not the owner.¹²⁷

§ 839. Remedies of principal on unauthorized pledge.

When the factor does pledge his principal's goods, without authority, the latter may maintain an action of trover against him for the conversion of the property,¹²⁸ or in settling accounts between himself and the factor, he is entitled to an allowance for any loss or damage that he may have suffered by reason of the unauthorized pledge;¹²⁹ or he may maintain an action of indebitatus assumpsit against the factor for the value of the goods.¹³⁰ Besides these remedies against the factor, he may also bring an action of trover against the pledgee, as for a conversion of the goods,¹³¹ and the pledgee may recoup the amount of the factor's charges and advances to the principal.¹³² And if the goods have not been sold by the pledgee, he may recover the goods themselves from him,¹³³ and in such case he need not pay the advances and charges made by the factor.¹³⁴ But if the pledgee has sold

¹²⁷ *Evans v. Trueman*, 1 Moody & R. 10.

¹²⁸ *Merchants' Nat. Bank v. Trenholm*, 12 Heisk. (Tenn.) 520; *Kelly v. Smith*, 1 Blatchf. 290, Fed. Cas. No. 7,675; *Bott v. McCoy*, 20 Ala. 578, 56 Am. Dec. 223.

¹²⁹ *Kelly v. Smith*, 1 Blatchf. 290, Fed. Cas. No. 7,675.

¹³⁰ *Kelly v. Smith*, 1 Blatchf. 290, Fed. Cas. No. 7,675.

¹³¹ *Bott v. McCoy*, 20 Ala. 584, 56 Am. Dec. 223; *Merchants' Nat. Bank v. Trenholm*, 12 Heisk. (Tenn.) 520; *Van Amringe v. Peabody*, 1 Mason, 440, Fed. Cas. No. 16,825; *Martini v. Coles*, 1 Maule & S. 140; *First Nat. Bank of Louisville v. Boyce*, 78 Ky. 42; *Peters v. Ballistier*, 3 Pick. (Mass.) 495. By tendering to the factor the amount due him. *Daubigny v. Duval*, 5 Term R. 604. Without any tender of factor's charges or advances. *Ludden v. Buffalo Batting Co.*, 22 Ill. App. 415. *Replevin*. *Gray v. Agnew*, 95 Ill. 315.

¹³² *Ludden v. Buffalo Batting Co.*, 22 Ill. App. 415; *Macky v. Dillinger*, 73 Pa. 85; *First Nat. Bank of Louisville v. Boyce*, 78 Ky. 42.

¹³³ *Bott v. McCoy*, 20 Ala. 578, 56 Am. Dec. 223; *Macky v. Dillinger*, 73 Pa. 85; *Lallande v. His Creditors*, 42 La. Ann. 705.

¹³⁴ *Macky v. Dillinger*, 73 Pa. 85; *Gray v. Agnew*, 95 Ill. 315.

the goods the principals may bring an action of *assumpsit* against him for money had and received.¹³⁵

§ 840. Power to delegate his authority.

A factor having been employed by reason of the confidence the principal has in his skill and discretion, he cannot ordinarily delegate his authority to another;¹³⁶ unless the principal confers on him such power of delegation or substitution; and this may be done in writing, by words, or by acts, which acts or words may by implication give the authority or ratify the substitution after it is made.¹³⁷

But of course this rule may be relaxed and a subagent be employed when such is the usual course of business. Where the usual course of the management of the principal's affairs in the employment of a subagent has been pursued for a length of time, and been recognized by the owners of property, they will be taken to have adopted the acts of the subagent as the acts of the factor himself;¹³⁸ or where from the nature of the trust it cannot be presumed that the prin-

¹³⁵ *Nowell v. Pratt*, 5 Cush. (Mass.) 111; *Chickering v. Hosmer*, 12 Mass. 183.

¹³⁶ *Catlin v. Bell*, 4 Camp. 183; *Cockran v. Irlam*, 2 Maule & S. 301, note; *Solly v. Rathbone*, 2 Maule & S. 298; *Schmaling v. Thonlinson*, 6 Taunt. 147; *Warner v. Martin*, 11 How. (U. S.) 209; *Harralson v. Stein*, 50 Ala. 347; *Terry v. Bamberger*, 44 Conn. 558; *Loomis v. Simpson*, 13 Iowa, 532; *Mark v. Bowers*, 4 Mart. (N. S.; La.) 95; *Reynolds v. Kirkman*, 8 Mart. (N. S.; La.) 464; *Housel v. Thrall*, 18 Neb. 484; *Burke v. Frye*, 44 Neb. 223; *Toland v. Murray*, 18 Johns. (N. Y.) 24; *Campbell v. Reeves*, 3 Head (Tenn.) 226; *Merchants' Nat. Bank v. Trenholm*, 12 Heisk. (Tenn.) 520. An assignee for the benefit of creditors of a factor does not become the factor of persons who had consigned goods to his assignor for sale. *Cameron v. Crouse*, 11 App. Div. (N. Y.) 391.

¹³⁷ *Loomis v. Simpson*, 13 Iowa, 532; *McMorris v. Simpson*, 21 Wend. (N. Y.) 610; *Grieff v. Cowgull*, 2 Disn. (Ohio) 58, 60; *Campbell v. Reeves*, 3 Head (Tenn.) 226; *Merchants' Nat. Bank v. Trenholm*, 12 Heisk. (Tenn.) 520.

¹³⁸ *Warner v. Martin*, 11 How. (U. S.) 209, 223; *Trueman v. Loder*, 11 Adol. & E. 589; *Terry v. Bamberger*, 44 Conn. 558; *Darling v. Stanwood*, 14 Allen (Mass.) 504; *Planters' & F. Nat. Bank v. First Nat. Bank*, 75 N. C. 534; *Strong v. Stewart*, 9 Heisk. (Tenn.) 137, 147.

principal expected the factor to accomplish the purpose by himself.¹³⁹ So if the necessities of the case require that the factor should employ a subagent, he may do so.¹⁴⁰ Of course, as in the case of all other agencies, the performance of mere ministerial or mechanical acts may be delegated to a subagent.

If the principal has, expressly or impliedly, authorized his factor to employ a subagent, and the factor exercises due care in the employment of such a person, he will not be liable for the acts of such subagent.¹⁴¹ "It must be remembered, however, that there is a wide difference between the employment of a servant or subagent by the factor, and the delegation of authority or a substitution. The factor may act through or by the hand of another, and yet there be no pretense that there has been a substitution in such a sense as to bind the principal. And until the fact of substitution, with the consent and approbation of the principal, is once established, there is no ground for claiming that his remedy is against the substitute instead of the original factor."¹⁴²

§ 841. To extend time of payment.

Usually when the factor has completed a sale, his services are performed, and if he sells on credit, he has no implied authority thereafter to extend the time of payment.¹⁴³

§ 842. To submit to arbitration.

For the same reason he has no implied power to bind his principal, by submitting to arbitration any claim or dispute that may arise out of the transaction in which he has been employed for his principal.¹⁴⁴ Thus, he cannot submit to

¹³⁹ *Grieff v. Cowgull*, 2 Disn. (Ohio) 58, 60.

¹⁴⁰ *McMorris v. Simpson*, 21 Wend. (N. Y.) 610; *Loomis v. Simpson*, 13 Iowa, 532; *Dorchester & M. Bank v. New England Bank*, 1 Cush. (Mass.) 177.

¹⁴¹ *McCants v. Wells*, 3 S. C. 569; *Loomis v. Simpson*, 13 Iowa, 532.

¹⁴² *Loomis v. Simpson*, 13 Iowa, 532.

¹⁴³ *Douglass v. Bernard*, Anth. (N. Y.) 278; *Hairston v. Medley*, 1 Grat. (Va.) 96. See, *Van Alen v. Vanderpool*, 6 Johns. (N. Y.) 69, 5 Am. Dec. 192.

¹⁴⁴ *Carnochan v. Gould*, 1 Bailey (S. C.) 179, 19 Am. Dec. 668;

arbitration a claim for damages arising out of an alleged breach of an implied warranty of the quality of the thing sold.¹⁴⁵

§ 843. To compromise.

A factor is employed to sell only, and when he has done so he has no implied authority to compromise the claim for the purchase price of the goods so sold, nor may he in any manner, without express authority, discharge such claim, except upon the receipt of the purchase price in full.¹⁴⁶

§ 844. To rescind sale.

And as the factor's authority ordinarily terminates when the sale is completed, he cannot thereafter do anything in the way of rescinding a sale previously made by him.¹⁴⁷

§ 845. To transfer property in payment of his own debt.

A factor, in order to pass title, must sell his principal's property according to the usages of trade or the instructions of his principal. He cannot, therefore, deliver the goods of his principal in satisfaction of his own debt, or sell them in any irregular manner so as to pass the title,¹⁴⁸ though he may have a lien on the goods for his advances,¹⁴⁹ or though

Ingraham v. Whitmore, 75 Ill. 24. But see *Curtis v. Barclay*, 5 Barn. & C. 141.

¹⁴⁵ *Carnochan v. Gould*, 1 Bailey (S. C.) 179, 19 Am. Dec. 668.

¹⁴⁶ *Greenleaf v. Moody*, 13 Allen (Mass.) 363; *Monnett v. Merz*, 127 N. Y. 151; *Blackman v. Green*, 24 Vt. 17.

¹⁴⁷ *Smith v. Rice*, 1 Bailey (S. C.) 648. See *Macaulay v. Palmer*, 125 N. Y. 742.

¹⁴⁸ *Warner v. Martin*, 11 How. (U. S.) 209; *Thompson v. Barnum*, 49 Iowa, 392; *Hadwin v. Flisk*, 1 La. Ann. 74; *Miller v. Schneider*, 19 La. Ann. 300, 92 Am. Dec. 535; *Benny v. Rhodes*, 18 Mo. 147, 59 Am. Dec. 293; *Benny v. Pegram*, 18 Mo. 191, 59 Am. Dec. 298; *Holton v. Smith*, 7 N. H. 446; *Childs v. Waterloo Wagon Co.*, 37 App. Div. (N. Y.) 242; *Hoffman v. Kramer*, 123 N. C. 566. Nor can the consignment be subjected by the consignee's creditors to the payment of his debts. *Sturm v. Baker*, 150 U. S. 312, 330; *Moore v. Hillabrand*, 16 Abb. N. C. (N. Y.) 477; *Thompson v. Barnum*, 49 Iowa, 392.

¹⁴⁹ *Benny v. Rhodes*, 18 Mo. 147, 59 Am. Dec. 293.

the accounts between the factor and principal may be in the factor's favor;¹⁵⁰ unless he is authorized by statute to do so.¹⁵¹ Thus where a factor has delivered goods of his principal in satisfaction of his own debts, although the factor has accepted and paid a bill of the principal drawn on account of the consignment, which exceeds in amount the value of the goods delivered, and there has been no appropriation of that payment to any particular items of the account between the principal and factor, nevertheless that amount will not be appropriated to payment for the goods so delivered by the factor.¹⁵²

The factor's authority is to sell only, and "when a contract is proposed between factors, or between a factor and a creditor, to pass property for an antecedent debt, it is not a sale in the legal sense of that word, or in any sense in which it is used in reference to the commission which a factor has to sell. It is not according to the usage of trade. It is a naked transfer of property in payment of a debt. Money, it is true, is the consideration of such transfer; but no money passes between the contracting parties. The creditor pays none, and when the debtor has given to him the property of another, in release of his obligation, their relation has only been changed by his violation of an agency which society, in its business relations, cannot do without. When such a transfer is made by a factor, for his debt, it is a departure from the usage of trade, known as well by the creditor as it is by the factor. It is more; it is a violation of all that a factor contracts to do with the property of his principal. It has been given to him to sell. He may sell for cash or he may do so upon credit, as may be the usage of trade. A transfer for an antecedent debt is not one thing or the other; both debtor and creditor know it to be neither."¹⁵³ So a factor cannot retain the proceeds of a sale of goods consigned to him for the purpose of can-

¹⁵⁰ *Benny v. Pegram*, 18 Mo. 191, 59 Am. Dec. 298.

¹⁵¹ See *Victor Sewing Mach. Co. v. Heller*, 44 Wis. 265; *Warner v. Martin*, 11 How. (U. S.) 209.

¹⁵² *Benny v. Rhodes*, 18 Mo. 147, 59 Am. Dec. 293.

¹⁵³ *Warner v. Martin*, 11 How. (U. S.) 209, 226.

celing a debt due to him from the person from whom the goods were derived.¹⁵⁴

§ 846. To indorse negotiable paper.

So it seems that a factor has no implied authority to make, accept, or indorse, negotiable paper on behalf of his principal,¹⁵⁵ and even where he agrees to indorse negotiable paper he is not bound to indorse a note taken for goods sold by a general agent of his principal over his protest, and after his statement that he would not indorse the note, though, after the sale, he delivered the goods, and took the note therefor the same as other customers' notes.¹⁵⁶

IV. DUTIES AND LIABILITIES OF FACTOR TO PRINCIPAL.

§ 847. How affected by usage.

It has been seen in a previous section that a factor's powers are regulated to a great extent by the usages of trade at the time and place in which he acts. From this it follows that his duties and liabilities to his principal are likewise regulated by such usages or customs; and if a factor in making a sale, acts in good faith according to the custom or usage at that time and place, in similar cases, and he has not express instructions to the contrary, he will not be responsible to his principal for any loss that may result therefrom.¹⁵⁷ In fact if he has not been instructed otherwise, it is his duty to act according to such usages and customs, and to transact the business entrusted to him in the manner in which it is

¹⁵⁴ Bell v. Powell, 23 La. Ann. 797; Succession of Norton, 24 La. Ann. 218.

¹⁵⁵ See Murray v. East India Co., 5 Barn. & Ald. 204.

¹⁵⁶ Springfield Fertilizer Co. v. Tompkins, 16 Ind. App. 403.

¹⁵⁷ Phillips v. Moir, 69 Ill. 155; Bailey v. Bensley, 87 Ill. 556; Blandford v. Wing Flour Mill Co., 24 Ill. App. 596; Kelley v. Maguire, 99 Ill. App. 317; Rapp v. Grayson, 2 Blackf. (Ind.) 130; Byrne v. Schwing, 6 B. Mon. (Ky.) 199; Goldsmith v. Manheim, 109 Mass. 187; Greenleaf v. Moody, 13 Allen (Mass.) 363; Clark v. Van Northwick, 1 Pick. (Mass.) 343; Davis v. Kobe, 36 Minn. 214, 1 Am. St. Rep. 663; Farmers' & M. Nat. Bank v. Sprague, 52 N. Y. 605; Vincent v. Rather, 31 Tex. 77, 98 Am. Dec. 516; Bliss v. Arnold, 8 Vt. 252, 30 Am. Dec. 467.

usually transacted by other factors at the same time and place.¹⁵⁸ And one who consigns merchandise to a factor at a foreign port cannot hold the factor responsible for the cancellation of a contract of sale by a purchaser as permitted by the custom of that port, even though the custom seems unreasonable.¹⁵⁹

§ 848. Duty to remain loyal.

As great confidence and trust is reposed by the principal in the factor, it is the duty of the latter to always remain loyal to the interests of the former, and to do nothing that will abuse the confidence and trust thus reposed in him. And, without the consent of his principal, it is his duty to undertake no business or to represent no interests, whether his own or another's, that will in any way conflict with his principal's interests.¹⁶⁰ Thus, a factor cannot, without the principal's consent, act as agent for both buyer and seller in the same transaction;¹⁶¹ nor can he unite in himself the opposite characters of buyer and seller, or seller and buyer, unless his relation with his principal has been dissolved, or there is a deliberate agreement between him and his principal to that effect. He cannot purchase on his own account that which his duty or trust requires him to sell on the account of his principal;¹⁶² nor can he purchase on account of his principal that which he sells on his own.¹⁶³

¹⁵⁸ *Brink v. Dolsen*, 8 Barb. (N. Y.) 337, 338.

¹⁵⁹ *Charlotte Oil & Fertilizer Co. v. Hartog*, 85 Fed. 150.

¹⁶⁰ *Clarke v. Tipping*, 9 Beav. 284; *Evans v. Potter*, 2 Gall. 12, Fed. Cas. No. 4,569; *Rice v. Brook*, 20 Fed. 611; *Eichel v. Sawyer*, 44 Fed. 847; *Babcock v. Orbison*, 25 Ind. 75; *Lesesne v. Cook*, 16 La. (O. S.) 62; *Greely v. Bartlett*, 1 Me. 172, 10 Am. Dec. 54; *Keighler v. Savage Mfg. Co.*, 12 Md. 383, 71 Am. Dec. 600; *Benedict v. Inland Grain Co.*, 80 Mo. App. 449; *Govan v. Cushing*, 111 N. C. 453. It is said in this case that "a factor is required to act with the utmost good faith toward his principal in the discharge of his duties."

¹⁶¹ *Bensley v. Moon*, 7 Ill. App. 415.

¹⁶² *Keighler v. Savage Mfg. Co.*, 12 Md. 383, 71 Am. Dec. 600; *Wadsworth v. Gay*, 118 Mass. 44; *Sims v. Miller*, 37 S. C. 402, 34 Am. St. Rep. 762; *Martin v. Moulton*, 8 N. H. 504; *Tilleny v. Wolverton*, 46 Minn. 256.

¹⁶³ *Keighler v. Savage Mfg. Co.*, 12 Md. 383, 71 Am. Dec. 600.

The principal may, however, elect to treat such a sale as valid, and maintain an action against the factor, as purchaser, for goods sold and delivered.¹⁶⁴ If the factor does not disclose the purchaser, the principal has a right to elect to affirm or repudiate the sale until he has knowledge that his factor is the purchaser; and if he subsequently affirm such sale he is entitled to recover the amount reported by the factor to be due him,¹⁶⁵ or he may repudiate the sale upon obtaining knowledge as to the purchaser and recover the highest market value of the goods at any time before obtaining such knowledge although the factor may have made advances on such goods.¹⁶⁶ Likewise, it is the factor's duty to deal with the subject of the agency for the principal's benefit only, and not to attempt to make any profit out of it for himself.¹⁶⁷

§ 849. To keep principal informed.

It follows from the above rule that it is also the factor's duty to give his principal all necessary and useful information respecting the affairs of his agency, that may be acquired by him, and which it is important that his principal should know in order that he may be better able to advance or protect his interests. If the factor, having such information, does not give it to his principal, after he has sufficient opportunity to do so, he will be responsible to the principal for any loss that may result from his negligence.¹⁶⁸ Thus, as has been

¹⁶⁴ *Wadsworth v. Gay*, 118 Mass. 44; *Sims v. Miller*, 37 S. C. 402, 34 Am. St. Rep. 762.

¹⁶⁵ *Sims v. Miller*, 37 S. C. 402, 34 Am. St. Rep. 762.

¹⁶⁶ *Sims v. Miller*, 37 S. C. 402, 34 Am. St. Rep. 762.

¹⁶⁷ *Hammond v. Olmstead*, 10 Fed. 223; *Thayer v. Hoffman*, 53 Kan. 723; *Poindexter v. King*, 21 La. Ann. 697; *Payne v. Waterston*, 16 La. Ann. 239; *Vandyke v. Brown*, 8 N. J. Eq. 657; *Hidden v. Waldo*, 55 N. Y. 294; *Mealor v. Kimble*, 6 N. C. (2 Murph.) 272; *Alexander v. Morris*, 3 Call. (Va.) 89.

¹⁶⁸ *Smith v. Lascelles*, 2 Term R. 187; *Forrestier v. Bordman*, 1 Story, 43, Fed. Cas. No. 4,945; *De Tastett v. Crousillat*, 2 Wash. C. C. 132, Fed. Cas. No. 3,828; *Western Union Cold Storage Co. v. Winona Produce Co.*, 197 Ill. 457; *Howe v. Sutherland*, 39 Iowa, 484; *De Lazard v. Hewitt*, 7 B. Mon. (Ky.) 698; *Area v. Milliken*, 35 La. Ann. 1150; *Pinkham v. Crocker*, 77 Me. 563; *Greely v. Bartlett*,

seen, where the factor is instructed to effect insurance on his principal's goods and he fails to do so, it is his duty to inform his principal of that fact, and if he does not do so, he himself will be liable, as insurer, for any loss that may follow therefrom;¹⁶⁹ and the same rule applies where it has been his custom to insure his principal's goods and he decides to do so no longer.¹⁷⁰ So where a factor selling the goods of his principal on credit, taking a note for the price, gives notice of the sale to his principal, and credits him with the amount, but omits to give notice of the nonpayment of the note at maturity, the factor becomes responsible for the whole amount of the debt.¹⁷¹

§ 850. Diligence and prudence required.

Where a person holds himself out to do the business of a factor he impliedly represents that he possesses the same degree of skill and knowledge as is usually possessed by others in the same business; and he is bound to exercise that skill and knowledge with a reasonable degree of diligence and prudence. If injury result from his failure to possess and exercise reasonable skill and diligence, he will be responsible therefor although he may have neither been guilty of fraud, nor of such gross negligence as to carry with it the insignia of fraud.¹⁷² Or as has been held: A consignee

1 Me. 172, 10 Am. Dec. 54; *Amory v. Hamilton*, 17 Mass. 108; *Given v. Lemoine*, 35 Mo. 119; *Railey v. Porter*, 32 Mo. 471, 82 Am. Dec. 141; *Spruill v. Davenport*, 116 N. C. 34; *Devall v. Burbridge*, 4 Watts & S. (Pa.) 305; *Arrott v. Brown*, 6 Whart. (Pa.) 9; *Brown v. Arrott*, 6 Watts & S. (Pa.) 402; *Harvey v. Turner*, 4 Rawle (Pa.) 223.

¹⁶⁹ *Callander v. Oelrichs*, 5 Bing. N. C. 58; *Smith v. Lascelles*, 2 Term R. 187; *De Tastett v. Crousillat*, 2 Wash. C. C. 132, Fed. Cas. No. 3,828.

¹⁷⁰ *Area v. Milliken*, 35 La. Ann. 1150; *Smith v. Lascelles*, 2 Term R. 187.

¹⁷¹ *Harvey v. Turner*, 4 Rawle (Pa.) 223.

¹⁷² *Evans v. Potter*, 2 Gall. 12, Fed. Cas. No. 4,569; *Burrill v. Phillips*, 1 Gall. 360, Fed. Cas. No. 2,200; *Milwaukee Nat. Bank v. City Bank of Oswego*, 103 U. S. 668; *Foster v. Bush*, 104 Ala. 662; *Brown v. Clayton*, 12 Ga. 564; *Foster v. Waller*, 75 Ill. 464; *Deahler v. Beers*, 32 Ill. 368, 83 Am. Dec. 274; *Chandler v. Hogle*, 58 Ill. 46;

is bound to the same degree of care and diligence, in conducting the business of the consignor, which a prudent man would exercise in the management of his own affairs, and is liable to the consignor in case of negligence.¹⁷³ If, for example, he delays a sale of goods consigned to him for an unreasonable length of time, and the goods depreciate in value, so that his principal loses, he is liable for the loss.¹⁷⁴

A factor is not held, however, to such a degree of diligence, that he shall be successful at all events, but it is only required of him that he exercise the same degree of diligence and skill as is usually exercised by others in the same calling, under similar circumstances. Thus a factor who has advised the sale of a consignment of goods, and has informed the consignor of the weak condition of the market, by holding the consignment in accordance with the directions of the consignor, does not become liable for a failure to use diligence, merely because he afterwards sells the same on a low market.¹⁷⁵ Nor will he be responsible for an error of judg-

Phillips v. Moir, 69 Ill. 155; Craig v. Harrison-Switzer Mill. Co., 103 Ill. App. 486; Babcock v. Orbison, 25 Ind. 75; Durant v. Fish, 40 Iowa, 559; Bartle v. Phelps, 39 Iowa, 498; Howe v. Sutherland, 39 Iowa, 484; Atkinson v. Burton, 4 Bush (Ky.) 299; Francis v. Castleman, 4 Bibb (Ky.) 282; Lesesne v. Cook, 16 La. (O. S.) 58; Hill v. White, 11 La. Ann. 170; Folsom v. Mussey, 8 Me. 400, 23 Am. Dec. 522; Greely v. Bartlett, 1 Me. 172, 10 Am. Dec. 54; Adams v. Capron, 21 Md. 186, 83 Am. Dec. 566; Ewalt v. Harding, 16 Md. 160; Roberts v. Cobb, 76 Minn. 420; McLean v. Rutherford, 8 Mo. 109; Benedict v. Inland Grain Co., 80 Mo. App. 449; Jervis v. Hoyt, 2 Hun (N. Y.) 637; Milbank v. Dennistoun, 21 N. Y. 386; Van Alen v. Vanderpool, 6 Johns. (N. Y.) 69, 5 Am. Dec. 192; Leverick v. Meigs, 1 Cow. (N. Y.) 645; Patterson v. McIver, 90 N. C. 493; Spruill v. Davenport, 116 N. C. 34; Govan v. Cushing, 111 N. C. 458; Conway v. Lewis, 120 Pa. 215, 6 Am. St. Rep. 700; Dickson v. Screven, 23 S. C. 212; McCants v. Wells, 3 Rich. (S. C.) 569; Walker v. McCaull, 13 S. D. 512; Vincent v. Rather, 31 Tex. 77, 98 Am. Dec. 516; Howatt v. Davis, 5 Munf. (Va.) 34, 7 Am. Dec. 681.

¹⁷³ Deshler v. Beers, 32 Ill. 368, 83 Am. Dec. 274. But see Foster v. Waller, 75 Ill. 464, where it is held that he must exercise a "high degree of vigilance" in learning the pecuniary ability of the purchaser where he makes a sale on change.

¹⁷⁴ Roberts v. Cobb, 76 Minn. 420.

¹⁷⁵ Charlotte Oil & Fertilizer Co. v. Hartog, 85 Fed. 150.

ment, if he otherwise acts in good faith and with due diligence and skill.¹⁷⁶ As to whether or not a factor has been negligent in any transaction is a question to be determined by the jury from the circumstances of the case, with instructions from the court.¹⁷⁷

§ 851. Duty in regard to instructions.

(a) **In general.**—As a general rule, it is the duty of a factor to obey all instructions given to him by his principal. If he does not do so, and the case falls under none of the exceptions hereafter noted, he will be liable to his principal for any loss that may ensue as a result of his disobedience.¹⁷⁸

¹⁷⁶ *Moore v. Mourgue*, Cowp. 480; *Van Alen v. Vanderpool*, 6 Johns. (N. Y.) 69, 5 Am. Dec. 192; *Leverick v. Meigs*, 1 Cow. (N. Y.) 645; if his instructions give him a discretion in selling, *Milbank v. Dennistoun*, 21 N. Y. 386.

¹⁷⁷ *Heinemann v. Heard*, 62 N. Y. 452; *Elchel v. Sawyer*, 44 Fed. 845. Compare *Ewalt v. Harding*, 16 Md. 160.

¹⁷⁸ *England*: *De Comas v. Prost*, 3 Moore P. C. (N. S.) 158; *Smart v. Sandars*, 5 C. B. 895; *Stearine Kaarsen Fabrick Gonda Co. v. Heintzmann*, 112 E. C. L. 56, 17 C. B. (N. S.) 56.

United States: *Courcier v. Ritter*, 4 Wash. C. C. 549, Fed. Cas. No. 3,282; *Brown v. McGran*, 14 Pet. 479; *Elchel v. Sawyer*, 44 Fed. 850. *Connecticut*: *Weed v. Adams*, 37 Conn. 378.

Georgia: *Day v. Crawford*, 13 Ga. 508; *Hatcher v. Comer*, 73 Ga. 418; *Gray v. Bass*, 42 Ga. 270.

Illinois: *Shoenfeld v. Fleisher*, 73 Ill. 404; *Larminie v. Carley*, 114 Ill. 198; *Rollins v. Duffy*, 18 Ill. App. 398.

Louisiana: *Copes v. Phelps*, 24 La. Ann. 562; *Gordon v. Wright*, 29 La. Ann. 812; *Poindexter v. King*, 21 La. Ann. 697.

Maryland: *Curtis v. Gibney*, 59 Md. 131.

Massachusetts: *Maynard v. Pease*, 99 Mass. 555; *Dwight v. Whitney*, 15 Pick. 179.

Michigan: *Howland v. Davis*, 40 Mich. 545.

Minnesota: *Mobile Fruit & Trading Co. v. Potter*, 78 Minn. 487.

Mississippi: *Cotton v. Hiller*, 52 Miss. 7.

Missouri: *Sigerson v. Pomeroy*, 13 Mo. 620; *Switzer v. Connett*, 11 Mo. 88; *Pomeroy v. Sigerson*, 22 Mo. 177; *Furth v. Miller's Ex'r*, 67 Mo. App. 241.

Nebraska: *Housel v. Thrall*, 18 Neb. 484.

New Hampshire: *Frothingham v. Everton*, 12 N. H. 239.

New York: *Evans v. Root*, 7 N. Y. 186, 57 Am. Dec. 512; *Scott v. Rogers*, 31 N. Y. 676; *Blot v. Boiceau*, 3 N. Y. 78, 51 Am. Dec. 345; *Leverick v. Meigs*, 1 Cow. 645; *Hilton v. Vanderbilt*, 82 N. Y. 591.

But if he obeys such instructions and the loss is caused without any fault on his part, the factor would not be liable therefor.¹⁷⁹ It is his duty to obey all instructions in regard to the sale of his principal's goods, and if he sells contrary to the directions of his principal he will be personally responsible for any damages or loss to his principal, resulting therefrom.¹⁸⁰ Thus if a factor or agent having sold goods belonging to his principal, be ordered by him not to deliver them to the buyer, while they are still in transitu, there being doubts as to the buyer's solvency, and the factor delivers them notwithstanding such order, and without receiving security, he will be responsible to the principal for the loss sustained by reason of the buyer's insolvency.¹⁸¹ So if a factor is instructed not to sell for less than a specified sum, and he disregards such instruction and sells below that price, he will be liable for the ensuing loss.¹⁸² If he is instructed to sell

North Carolina: Bessent v. Harris, 63 N. C. 542; Sprull v. Davenport, 116 N. C. 34.

Pennsylvania: Geyer v. Decker, 1 Yeates, 486; Porter v. Patterson, 15 Pa. 229.

South Carolina: Barksdale v. Brown, 1 Nott & McC. 517, 9 Am. Dec. 720; Wilkinson v. Campbell, 1 Bay, 169.

Tennessee: Johnson v. Wade, 2 Baxt. 480; Strong v. Stewart, 9 Heisk. 137; Thompson v. Woodruff, 7 Cold. 401.

Vermont: Bliss v. Arnold, 8 Vt. 252, 30 Am. Dec. 467; Bigelow v. Walker, 24 Vt. 149, 58 Am. Dec. 156.

Virginia: Howatt v. Davis, 5 Munf. 34, 7 Am. Dec. 681; Campbell v. Angus, 91 Va. 438.

Wisconsin: Hall v. Storrs, 7 Wis. 253.

If he is instructed to "sell on arrival," it is his duty to do so. Evans v. Root, 7 N. Y. 186, 57 Am. Dec. 512.

¹⁷⁹ Milburn Wagon Co. v. Evans, 30 Minn. 89; Barrows v. Cushman, 37 Mich. 481; Sigerson v. Pomeroy, 13 Mo. 620.

¹⁸⁰ Walker v. Smith, 4 Dall. (U. S.) 389; Barksdale v. Brown, 1 Nott & McC. (S. C.) 720, 9 Am. Dec. 720; Howatt v. Davis, 5 Munf. (Va.) 34, 7 Am. Dec. 681; Evans v. Root, 7 N. Y. 186, 57 Am. Dec. 512; Bliss v. Arnold, 8 Vt. 252, 30 Am. Dec. 467; Blot v. Boiceau, 8 N. Y. 78, 51 Am. Dec. 345; and see cases cited in preceding note.

¹⁸¹ Howatt v. Davis, 5 Munf. (Va.) 34, 7 Am. Dec. 681.

¹⁸² Blot v. Boiceau, 3 N. Y. 78, 51 Am. Dec. 345; Carson v. Field, 52 N. Y. Super. Ct. 196; George v. McNeill, 7 La. 124, 26 Am. Dec. 498; Dalby v. Stearns, 132 Mass. 230; Frothingham v. Everton, 12 N. H. 239.

for cash, he is responsible for the price of the goods if he sells on credit.¹⁸³ It is also his duty to obey instructions in reference to insurance; and where he has been instructed to insure or has agreed to do so, and he fails or neglects to do his duty in this respect, and does not notify his principal of such failure, he himself will be liable as insurer for any loss that may result.¹⁸⁴ No usage or good intention of the factor will warrant him in departing from the positive instructions of his principal.¹⁸⁵ If a factor, being instructed to sell for cash, permits a purchaser to take away the goods without paying for them, and the purchaser absconds, the factor is liable and cannot defend himself on the ground of a usage among factors allowing purchasers a week to make payment.¹⁸⁶

If, however, the principal consigns goods to a factor for sale, without instructing him, it confers upon the factor the right to exercise his judgment and discretion, and if he exercises such in good faith, he has performed his duty to his principal;¹⁸⁷ and he is neither bound to write for instructions, nor having written, to wait for a reply.¹⁸⁸ So where the principal instructs the factor to deal with the goods as his own, the factor may go ahead and sell the goods, and he is under no obligation to notify the consignor before making sales.¹⁸⁹

¹⁸³ *Bliss v. Arnold*, 8 Vt. 252, 30 Am. Dec. 467; *Hall v. Storrs*, 7 Wis. 253; *Furth v. Miller's Ex'x*, 67 Mo. App. 241. See ante, § 832.

¹⁸⁴ *Shoenfeld v. Fleisher*, 73 Ill. 404; *Gordon v. Wright*, 29 La. Ann. 812; *Perkins v. Washington Ins. Co.*, 4 Cow. (N. Y.) 645; *Thorne v. Deas*, 4 Johns. (N. Y.) 84; *De Tastett v. Crousillat*, 2 Wash. C. C. 132, Fed. Cas. No. 3,828; *Johnson v. Campbell*, 120 Mass. 449; *Callander v. Oelrichs*, 5 Bing. N. C. 58; *Park v. Hamond*, 4 Camp. 344.

¹⁸⁵ *Barksdale v. Brown*, 1 Nott & McC. (S. C.) 517, 9 Am. Dec. 720; *Hatcher v. Comer*, 73 Ga. 418; *Porter v. Patterson*, 15 Pa. 229; *Hall v. Storrs*, 7 Wis. 253.

¹⁸⁶ *Barksdale v. Brown*, 1 Nott & McC. (S. C.) 517, 9 Am. Dec. 720.

¹⁸⁷ *Conway v. Lewis*, 120 Pa. 215, 6 Am. St. Rep. 700; *Lotard v. Graves*, 3 Calnes (N. Y.) 226; *Milbank v. Dennistoun*, 1 Bosw. (N. Y.) 246; *Marfield v. Goodhue*, 3 N. Y. 72.

¹⁸⁸ *Conway v. Lewis*, 120 Pa. 215, 6 Am. St. Rep. 700.

¹⁸⁹ *Adams v. Capron & Co.*, 21 Md. 186, 83 Am. Dec. 567.

(b) **Instructions must be clear and unambiguous.**—The instructions given by a principal to his factor must be clear and distinct, and express, and not a mere communication of an expectation or belief as to the result of a transaction; and if they are so ambiguous that they are capable of more than one construction, and the factor in good faith acts according to one, he cannot be held liable if loss ensue, because the principal intended that he should act according to the other.¹⁹⁰ It is not necessary, however, in all cases, that the principal should give an order in the form of a command, in order to make it the duty of the factor to obey it; for, in the case of a simple consignment of goods, without any interest therein on the part of the consignee, or any advance or liability incurred thereon, the expression of a wish by the consignor may fairly be presumed to be an order,¹⁹¹ and any answer by the factor to the effect that he had noted the wish would be construed to be an assent thereto.¹⁹²

(c) **Effect of ratification.**—The principal may of course, either expressly or impliedly, ratify acts done by the factor in disobedience of his instructions; in which case the acts will be as binding on the principal as if previously authorized, and the factor will not be liable for any loss sustained by the principal by reason of such disobedience.¹⁹³ This

¹⁹⁰ *Courcier v. Ritter*, 4 Wash. C. C. 549, Fed. Cas. No. 3,282; *Manella v. Barry*, 7 Cranch (U. S.) 415; *De Tastett v. Crousillat*, 2 Wash. C. C. 132, Fed. Cas. No. 3,828; *Foster v. Rockwell*, 104 Mass. 167; *Mann v. Laws*, 117 Mass. 293; *Jervis v. Hoyt*, 2 Hun (N. Y.) 637; *Bessent v. Harris*, 63 N. C. 542; *Geyer v. Decker*, 1 Yeates (Pa.) 486.

¹⁹¹ *Story, Sales*, § 100; *Brown v. McGran*, 14 Pet. (U. S.) 494; *Marfield v. Douglass*, 1 Sandf. (N. Y.) 360, 405.

¹⁹² *Story, Sales*, § 100; *Brown v. McGran*, 14 Pet. (U. S.) 494; *Marfield v. Douglass*, 1 Sandf. (N. Y.) 360, 405.

¹⁹³ *Courcier v. Ritter*, 4 Wash. C. C. 549, Fed. Cas. No. 3,282; *Marshall v. Williams*, 2 Biss. 255, Fed. Cas. No. 9,136; *Rice v. Brook*, 20 Fed. 611; *Comer & Co. v. Way*, 107 Ala. 300; *Byrne v. Doughty*, 13 Ga. 46; *Ward v. Warfield*, 3 La. Ann. 468; *Farles v. Ranger*, 35 La. Ann. 102; *Kehlor v. Kemble*, 26 La. Ann. 713; *Cairnes v. Blecker*, 12 Johns. (N. Y.) 304; *Rogers v. Kneeland*, 10 Wend. (N. Y.) 219; *Woodward v. Suydam*, 11 Ohio, 363; *Frank v. Jenkins*, 22 Ohio St. 597; *Sims v. Miller*, 37 S. C. 402, 34 Am. St. Rep. 762.

ratification may as well be made impliedly by silence or conduct, as by express words or acts. If the factor advises his principal of his acts, the latter, within a reasonable time, must elect to approve or disapprove the unauthorized acts of the factor, of which he has been informed. He cannot remain silent and await the vicissitudes of a fluctuating market, and, if the price rises, disaffirm and claim the difference; or, if it declines, acquiesce in the sale. If he does not disaffirm within a reasonable time and so notify the factor, the latter may well presume that his conduct has been approved.¹⁹⁴ Thus, if a sale is made contrary to instructions, as by selling below a limited price, and the principal upon receipt of the account of sales should make no objections, within a reasonable time, or should draw for the balance due him, he would thereby ratify the factor's act in departing from his instructions and relieve him from any liability for the difference.¹⁹⁵ It is necessary, however, that the principal should have had knowledge of all the material facts, in order that his acts or conduct may amount to a ratification of the factor's acts contrary to instructions.¹⁹⁶

Where the principal sues for the price of goods sold by the factor, without authority, he thereby ratifies the unauthorized sale. *Smith v. Hodson*, 4 Term R. 211; *Peters v. Ballistier*, 3 Pick. (Mass.) 495; *Surgat v. Potter*, 12 Mart. (O. S.; La.) 365. But the mere fact that the principal makes further consignments to a factor, after the latter has disobeyed certain instructions, does not amount to a ratification of such disobedience. *Maggoffin v. Cowan*, 11 La. Ann. 554.

¹⁹⁴ *Dunbar v. Miller*, 1 Brock. 85, Fed. Cas. No. 4,130; *Norris v. Cook*, 1 Curt. 464, Fed. Cas. No. 10,305; *Bradley v. Richardson*, 2 Blatchf. 343, Fed. Cas. No. 1,786; *Kendall v. Earl* (Cal.) 44 Pac. 791; *Searing v. Butler*, 69 Ill. 575; *McGeoch v. Hooker*, 11 Ill. App. 649; *Ward v. Warfield*, 3 La. Ann. 468; *Flower v. Downs*, 6 La. Ann. 538; *Kehlor v. Kemble*, 26 La. Ann. 713; *Mann v. Laws*, 117 Mass. 293; *Meyer v. Morgan*, 51 Miss. 21, 24 Am. Rep. 617; *Austin v. Ricker*, 61 N. H. 97; *Cairnes v. Blecker*, 12 Johns. (N. Y.) 304; *Vianna v. Barclay*, 3 Cow. (N. Y.) 281; *Jervis v. Hoyt*, 2 Hun (N. Y.) 637; *Woodward v. Suydam*, 11 Ohio, 360; *Bredin v. Dubarry*, 14 Serg. & R. (Pa.) 27; *Boyce v. Smith*, Dud. (S. C.) 248.

¹⁹⁵ *Meyer v. Morgan*, 51 Miss. 21, 24 Am. Rep. 617; *Richmond Mfg. Co. v. Starks*, 4 Mason, 296, Fed. Cas. No. 11,802; *Kendall v. Earl* (Cal.) 44 Pac. 791; *Reynolds v. Fenton*, 2 Phila. (Pa.) 222.

¹⁹⁶ *Lorraine v. Cartwright*, 3 Wash. C. C. 151, Fed. Cas. No. 8,500;

(d) **Exceptions to general rule.**—To the above general rule, however, there are certain exceptions or qualifications.

(1) If a factor uses a reasonable degree of skill and diligence in carrying out his principal's instructions, but for some reason, not his own fault, he is unable to comply with such instructions, he will not be liable for a failure to comply;¹⁹⁷ but his inability to comply will not excuse a deviation from such instructions.¹⁹⁸

(2) Where unforeseen or extraordinary emergencies arise, it would seem that the factor would be justified in deviating from his instructions, if he does so in good faith and for the purpose of protecting his principal's interest, although the transaction turns out disadvantageously to his principal.¹⁹⁹

(3) A factor, with orders not to sell below a certain price, is not liable for a sale at a lower price, where a higher price than that at which the sale was made could not have been obtained at any time between the time of sale and inception of the suit, and especially so if, in addition, the sale made was rather to the advantage than to the detriment of the principal.²⁰⁰

(e) **Effect of disobedience where factor has made advances.**—Another exception or qualification to the above general rule seems to exist under certain circumstances where the factor has made advances in behalf of his principal, on the faith of the goods consigned to him. It is generally held, how-

Norris v. Cook, 1 Curt. 464, Fed. Cas. No. 10,305; Courcier v. Ritter, 4 Wash. C. C. 549, Fed. Cas. No. 3,282. And see ante, c. 6.

¹⁹⁷ De Tastett v. Crousillat, 2 Wash. C. C. 132, Fed. Cas. No. 3,828; Dunbar v. Gregg, 44 Ill. App. 527; Durant v. Fish, 40 Iowa, 559; Evans v. Root, 7 N. Y. 186, 57 Am. Dec. 512; Hagan v. Paine, 2 N. C. 272.

¹⁹⁸ Pomeroy v. Sigerson, 22 Mo. 177; Leverick v. Melgs, 1 Cow. (N. Y.) 645.

¹⁹⁹ Forrestier v. Bordman, 1 Story, 43, Fed. Cas. No. 4,945; Goodwille v. McCarthy, 45 Ill. 186; Greenleaf v. Moody, 13 Allen (Mass.) 363; Frothingham v. Everton, 12 N. H. 239; Joslin v. Cowee, 52 N. Y. 90, 95; Milbank v. Dennistoun, 21 N. Y. 386; Lawler v. Keaquick, 1 Johns. Cas. (N. Y.) 174; Dusar v. Perit, 4 Bin. (Pa.) 361.

²⁰⁰ George v. McNeill, 7 La. 124, 26 Am. Dec. 498; Blot v. Boiceau, 3 N. Y. 78, 51 Am. Dec. 345; Charlotte Oil & Fertilizer Co. v. Hartog, 85 Fed. 150.

ever, that he is not justified in departing from his instructions and selling below a fixed price, or at all, from the mere fact that he has made advances on the property consigned.²⁰¹ But it seems to be well settled in this country that where the factor has made advances and the principal does not repay him within a reasonable time after he has demanded such repayment, the factor may make sufficient sales to repay his advances, although he sells for a less price than that fixed by the principal.²⁰² So a factor who has made large advances to his principal upon property consigned to him for sale, which property has become doubtful security for his reimbursement, and who has repeatedly demanded repay-

²⁰¹ *George v. McNeill*, 7 La. 124, 26 Am. Dec. 498; *Blot v. Boiceau*, 3 N. Y. 78, 51 Am. Dec. 345; *Hilton v. Vanderbilt*, 82 N. Y. 591; *Marfield v. Goodhue*, 3 N. Y. 62; *Butterfield v. Stephens*, 59 Iowa, 596; *Phillips v. Scott*, 43 Mo. 86, 97 Am. Dec. 369.

²⁰² *Feld v. Farrington*, 10 Wall. (U. S.) 141; *Brown v. McGraw*, 14 Pet. (U. S.) 479; *Fordyce v. Peper*, 16 Fed. 516; *Eichel v. Sawyer*, 44 Fed. 845; *Barnett v. Warren*, 82 Ala. 557; *Weed v. Adams*, 37 Conn. 378; *Heard v. Russell*, 59 Ga. 25; *Willingham v. Rushing*, 105 Ga. 72; *Nelson v. Chicago, B. & Q. R. Co.*, 2 Ill. App. 180; *Bailey v. Bensley*, 87 Ill. 556; *Mooney v. Musser*, 45 Ind. 115; *Butterfield v. Stephens*, 59 Iowa, 596; *Capron v. Adams*, 28 Md. 529; *Whitney v. Wyman*, 24 Md. 131; *Dalby v. Stearns*, 132 Mass. 230; *Parker v. Brancker*, 22 Pick. (Mass.) 40; *Davis v. Kobe*, 36 Minn. 214, 1 Am. St. Rep. 663; *Cotton v. Hiller*, 52 Miss. 7; *Howard v. Smith*, 56 Mo. 314; *Benny v. Rhodes*, 18 Mo. 147; *Given v. Lemoine*, 35 Mo. 110; *Columbian Nat. Bank v. White*, 65 Mo. App. 677; *Frothingham v. Everton*, 12 N. H. 239; *Milliken v. Dehon*, 27 N. Y. 364 (in pursuance of an agreement); *S. Blaisdale Co. v. Lee*, 127 N. C. 365; *Porter v. Patterson*, 15 Pa. 229; *Watson v. Beatty* (Pa.) 13 Atl. 521; *Gill v. Beattie*, 29 Wkly. Notes Cas. (Pa.) 459; *Beadles v. Hartman*, 7 Baxt. (Tenn.) 476; *Hornsby v. Fielding*, 10 Helsk. (Tenn.) 367; *Blair v. Childs*, 10 Helsk. (Tenn.) 199; *Bell v. Hannah*, 3 Baxt. (Tenn.) 47; *Campbell v. Angus*, 91 Va. 438; *Lockett v. Baxter*, 3 Wash. T. 350. The rule in England seems to be otherwise. See *De Comas v. Prost*, 3 Moore P. C. (N. S.) 158; *Smart v. Sanders*, 5 C. B. 895; *Raleigh v. Atkinson*, 6 Mees. & W. 676. A factor who has made advances to his consignee may proceed to sell, notwithstanding the service of an attachment, sued out by a creditor. The attaching creditor cannot arrest a sale without tendering to the factor the amount of his advances. *Baugh v. Kirkpatrick*, 54 Pa. 84, 93 Am. Dec. 675.

ment of his advances, or security therefor, without compliance by the principal, may, after reasonable notice to his principal, with reasonable discretion and in good faith, sell the property, although directed by the principal to hold it longer.²⁰³ But the factor can thus act contrary to his instructions only to the extent of selling so much of the consignment as may be necessary to reimburse his advances, or meet his liabilities incurred on account thereof.²⁰⁴ After the factor has sold sufficient goods to reimburse himself, as to the remainder, he is bound to obey the original instructions of his principal.²⁰⁵ If, however, at the time the factor makes the advances on the goods, he agrees to sell only at a fixed sum, or at a specified time, he will be held to have waived the right to sell for his reimbursement.²⁰⁶ So the factor may lawfully disregard his instructions, where he is directed to sell, and it is manifest or reasonably probable that upon the terms his security will be prejudiced or impaired thereby.²⁰⁷

This doctrine has been well stated by Mr. Justice Story as follows: "We understand the true doctrine on this subject to be this: Wherever a consignment is made to a factor for sale, the consignor has a right, generally, to control the sale thereof, according to his own pleasure, from time to time, if no advances have been made or liabilities incurred on account thereof; and the factor is bound to obey his orders. This arises from the ordinary relation of principal and agent. If, however, the factor makes advances, or incurs liabilities on account of the consignment, by which he acquires a special property therein; then the factor has a right to sell so much of the consignment as may be necessary

²⁰³ *Davis v. Kobe*, 36 Minn. 214, 1 Am. St. Rep. 663.

²⁰⁴ *Brown v. McGran*, 14 Pet. (U. S.) 479; *Whitney v. Wyman*, 24 Md. 131; *Bell v. Hannah*, 3 Baxt. (Tenn.) 47; *Howard v. Smith*, 56 Mo. 314; *Nelson v. Chicago, B. & Q. R. Co.*, 2 Ill. App. 180.

²⁰⁵ *Weed v. Adams*, 37 Conn. 378.

²⁰⁶ *Brown v. McGran*, 14 Pet. (U. S.) 479; *Heard v. Russell*, 59 Ga. 25; *Gray v. Bass*, 42 Ga. 270; *Elchel v. Sawyer*, 44 Fed. 845, 850; *Fordyce v. Peper*, 16 Fed. 516; *Marfield v. Goodhue*, 3 N. Y. 62.

²⁰⁷ *Weed v. Adams*, 37 Conn. 378; *Howland v. Davis*, 40 Mich. 545; *Butterfield v. Stephens*, 59 Iowa, 596; *Blair v. Childs*, 10 Heisk. (Tenn.) 199; *Felld v. Farrington*, 10 Wall. (U. S.) 141; *Lockett v. Baxter*, 3 Wash. T. 350.

to reimburse such advances or meet such liabilities; unless there is some existing agreement between himself and the consignor, which controls or varies this right. Thus, for example, if contemporaneous with the consignment and advances or liabilities there are orders given by the consignor which are assented to by the factor, that the goods shall not be sold until a fixed time, in such a case, the consignment is presumed to be received by the factor subject to such orders; and he is not at liberty to sell the goods to reimburse his advances or liabilities, until after that time has elapsed. The same rule will apply to orders not to sell below a fixed price; unless, indeed, the consignor shall, after due notice and request, refuse to provide any other means to reimburse the factors. And in no case will the factor be at liberty to sell the consignment contrary to the orders of the consignor, although he has made advances, or incurred liabilities thereon; if the consignor stands ready, and offers to reimburse and discharge such advances and liabilities."

"On the other hand, where the consignment is made generally, without any specific orders as to the time or mode of sale, and the factor makes advances or incurs liabilities on the footing of such consignment, there the legal presumption is, that the factor is intended to be clothed with the ordinary rights of factors to sell in the exercise of a sound discretion, at such time and in such mode as the usage of trade and his general duty require; and to reimburse himself for his advances and liabilities, out of the proceeds of the sale; and the consignor has no right, by any subsequent orders, given after advances have been made or liabilities incurred by the factor, to suspend or control this right of sale, except so far as respects the surplus of the consignment, not necessary for the reimbursement of such advances or liabilities. Of course, this right of the factor to sell to reimburse himself for his advances and liabilities, applies with stronger force to cases where the consignor is insolvent, and where, therefore, the consignment constitutes the only fund for indemnity."²⁰⁸

²⁰⁸ Brown v. McGran, 14 Pet. (U. S.) 494; and see cases cited in preceding notes of this section.

(f) **Measure of damages for disobedience.**—The amount to be recovered, where the factor disobeys his instructions, as where he sells at less than the specified price, is the actual loss sustained by the principal, and if no actual damage appears to have been suffered, then only nominal damages can be recovered.²⁰⁹ But there is some conflict among the authorities as to what is the true rule in determining what damages have been sustained. Whether it is to be measured by comparison with the highest market value of the goods since the time of sale to the time of trial, or within a reasonable time, or by comparison with the price limited by the principal. Livermore, in his valuable treatise on Agency, is said to have laid down the broad principle that a factor who sells below the limited price is chargeable with the difference. That this rule is the proper one in most cases may be admitted, but it is equally clear that in some cases the owner of the goods may justly contend that this rule affords him an inadequate satisfaction, while the factor may insist that it mulcts him in excessive damages, when the owner is not entitled to any.²¹⁰ Thus, if a factor, who had sold below the limited price, could show that this price was so extravagant that neither at the time of the sale, nor at any period since, could it be obtainable, the factor might well contend, that Livermore's rule subjected him to excessive damages, and that the market value afforded a just measure of damage.²¹¹ So where the factor was instructed to sell at a cer-

²⁰⁹ *Courcier v. Ritter*, 4 Wash. C. C. 549, Fed. Cas. No. 3,282; *Walker v. Smith*, 1 Wash. C. C. 152, Fed. Cas. No. 17,086; *Lehman v. Pritchett*, 84 Ala. 512; *Lubert v. Chauviteau*, 3 Cal. 458, 58 Am. Dec. 415; *Union Hardware Co. v. Plume & A. Mfg. Co.*, 58 Conn. 219; *Day v. Crawford*, 13 Ga. 508; *Copes v. Phelps*, 24 La. Ann. 562; *George v. McNeill*, 7 La. 124, 26 Am. Dec. 498; *Dalby v. Stearns*, 132 Mass. 230; *Frothingham v. Everton*, 12 N. H. 239; *Blot v. Boiceau*, 3 N. Y. 78, 51 Am. Dec. 345; *Hinde v. Smith*, 6 Lans. (N. Y.) 464; *Hornsby v. Fielding*, 10 Heisk. (Tenn.) 367; *Johnson v. Wade*, 2 Baxt. (Tenn.) 480.

²¹⁰ *George v. McNeill*, 7 La. 124, 26 Am. Dec. 498, citing *Livermore, Agency* (Baltimore Ed.) vol. 1, pp. 380, 384; *Blot v. Boiceau*, 3 N. Y. 78, 51 Am. Dec. 345; *Switzer v. Connett*, 11 Mo. 88.

²¹¹ *George v. McNeill*, 7 La. 124, 26 Am. Dec. 498; *Blot v. Boiceau*, 3 N. Y. 78, 51 Am. Dec. 345.

tain time which he did not do, the measure of damages was held to be the difference between the price at the time when the factor sold and the time when he was authorized to sell.²¹² In some cases it has been held that the proper value from which to compute damages was the highest market value of the goods at any time since the sale up to the time of trial.²¹³ This rule, however, is thought to be very unjust as it places no restrictions whatever upon the principal, but gives him an unlimited time within which to bring his action and allows him the advantage of the highest market value within that time. Under this rule the principal could delay the trial as long as possible so as to get the benefit of a higher market if it should occur. The better and more reasonable rule, however, is held to be that the measure of damages in such cases is governed by the highest market value of the goods within a reasonable time, in which action is to be brought, after the time of the unauthorized sale.²¹⁴

§ 852. Duty to account.

(a) *In general.*—It is the duty of a factor to keep books, in which shall be regularly and correctly entered all transactions on account of his principal, and, within a reasonable time, or upon a reasonable demand, after sale, to render to the principal a correct copy of such entries, including all memoranda connected therewith.²¹⁵ If the circumstances

²¹² *Fordyce v. Peper*, 16 Fed. 516.

²¹³ *Romaine v. Van Allen*, 26 N. Y. 309; *Burt v. Dutcher*, 34 N. Y. 493; *Markham v. Jaudon*, 41 N. Y. 235. See *Blot v. Boiceau*, 3 N. Y. 78, 51 Am. Dec. 345.

²¹⁴ *Whelan v. Lynch*, 60 N. Y. 469, 19 Am. Rep. 202; *Scott v. Rogers*, 4 Abb. Dec. 157, 31 N. Y. 676; *Matthews v. Coe*, 49 N. Y. 57; *Gallagher v. Jones*, 129 U. S. 193; *Sturges v. Keith*, 57 Ill. 451, 11 Am. Rep. 28; *Rollins v. Duffy*, 18 Ill. App. 398; *Maynard v. Pease*, 99 Mass. 555. Compare *Baker v. Drake*, 53 N. Y. 211, 13 Am. Rep. 507.

²¹⁵ *Clarke v. Tipping*, 9 Beav. 284; *Topham v. Braddick*, 1 Taunt. 572; *Tyree v. Parham's Ex'r*, 66 Ala. 431; *Lindley v. Downing*, 2 Ind. 418; *Haas v. Damon*, 9 Iowa, 589; *Keighler v. Savage Mfg. Co.*, 12 Md. 383, 71 Am. Dec. 600; *Clark v. Moody*, 17 Mass. 145; *Langley v. Sturtevant*, 7 Pick. (Mass.) 214; *Dodge v. Perkins*, 9 Pick. (Mass.) 387; *Eaton v. Welton*, 32 N. H. 352; *Burns v. Pillsbury*, 17

of the case are such that the principal cannot conveniently or practically make a demand for an accounting, then it is the factor's duty to account within a reasonable time although no demand has been made.²¹⁶ His engagement, when employed, for a compensation, is that he will faithfully dispose of the goods or merchandise, with a proper regard to the advices of his principal, and honestly account for the proceeds.²¹⁷ But if he has been expressly instructed, or his contract of employment contains a stipulation to account at a certain time, it is his duty to account at that time.²¹⁸ If the factor knowingly transmits to his principal a grossly false and fraudulent account of sales, and does not enter the sales on his books until months after they are made, and then enters them falsely, no credit will be given to him or his books.²¹⁹ And if he falsely accounts at an underprice, he is liable to make additional compensation for the property.²²⁰ But a factor cannot be deprived of commissions, on account of an honest mistake in rendering his account.²²¹

— **Acceptance of account.** The principal, however, may accept or ratify an account, and be bound thereby, although the account is in some respects incorrect or untrue. And if the principal, with knowledge, accepts it as correct, he is bound thereby, if it is in fact correct.²²² If he is not satisfied

N. H. 66; *Cooley v. Betts*, 24 Wend. (N. Y.) 203; *Armour v. Gaffey*, 30 App. Div. 121, 165 N. Y. 630; *Terwilliger v. Beals*, 6 Lans. (N. Y.) 403; *Pinckney v. Dunn*, 2 Rich. (S. C.) 314. The factor cannot refuse to render an account merely because there is a law in the state forbidding the sale. *Tate v. Pegues*, 28 S. C. 463.

²¹⁶ *Eaton v. Welton*, 32 N. H. 352.

²¹⁷ *Martin v. Pope*, 6 Ala. 532, 41 Am. Dec. 67.

²¹⁸ *Leake v. Sutherland*, 25 Ark. 219.

²¹⁹ *Fordyce v. Peper*, 16 Fed. 516.

²²⁰ *Bigelow v. Walker*, 24 Vt. 149, 58 Am. Dec. 156.

²²¹ *Everingham v. Halsey*, 108 Iowa, 709.

²²² *Everingham v. Halsey*, 108 Iowa, 709. Accepting the final account of a factor, without objection, discharges him from all further liability to account for sales made by him on a credit, the proceeds of which he has not collected. *Rion v. Gilly*, 6 Mart. (La.) 417, 12 Am. Dec. 483. When an account of sales of a consignment is rendered by a factor, and the consignor thereupon draws on the factor for "balance due on account sales," and the draft is honored,

with an account as rendered, and does not wish to accept or ratify it, he must make his objections thereto within a reasonable time after it has been rendered. If he does not do so it will be taken for granted that he wishes to accept the account as it is. Thus, if the principal is dissatisfied with his factor's sale, and he has been informed of the transaction by a statement and account of sales, he must express his dissatisfaction within a reasonable time, or be held to have ratified the sale and rendered the account a stated one.²²³ So when the factor has rendered his account, which has been fully settled with full knowledge of all the items of which it is composed, without a demand for the names of purchasers, he cannot in the absence of fraud on his part, be compelled to furnish such names after any considerable lapse of time. The demand for names should have been made at the time of the adjustment, or within a reasonable time thereafter.²²⁴

— **Defenses.** In an action against the factor for failing to account, the latter may often have certain defenses that will excuse or justify such failure or negligence. Thus, where the principal has demanded an account from his factor, the latter may show, as a defense, that the goods have been taken away from him by one having a title superior to the principal's,²²⁵ but he cannot deny his principal's title,²²⁶ nor can he set up, as a defense to his failing to account, the fact that the transaction was illegal.²²⁷

— **Account of foreign factor.** A factor's account for advances to a foreign customer is governed by the law of the

in the absence of fraud, omission, or mistake, the account becomes stated and settled. *Charlotte Oil & Fertilizer Co. v. Hartog*, 85 Fed. 150.

²²³ *Comer v. Way*, 107 Ala. 300, 54 Am. St. Rep. 93 (four months' delay held too long); *Allen-West Commission Co. v. Patillo*, 90 Fed. 628; *Wittkowski v. Harris*, 64 Fed. 712; *Eichel v. Sawyer*, 44 Fed. 845; *Austin v. Ricker*, 61 N. H. 97; *Dows v. Durfee*, 10 Barb. (N. Y.) 213.

²²⁴ *Keighler v. Savage Mfg. Co.*, 12 Md. 383, 71 Am. Dec. 600.

²²⁵ *Bain v. Clark*, 39 Mo. 252.

²²⁶ *Barnard v. Kobbe*, 54 N. Y. 516; *Marvin v. Ellwood*, 11 Paige (N. Y.) 365; *Bain v. Clark*, 39 Mo. 252.

²²⁷ *Baldwin v. Potter*, 46 Vt. 403. See *Tate v. Pegues*, 28 S. C. 463.

factor's domicile, unless there is a stipulation to the contrary.²²⁸

(b) **For goods or money.**—In the absence of an agreement, express or implied from the course of business or dealing between the parties, giving to the factor the right to appropriate to his own use the proceeds of sale, they belong to the principal, subject only to the lien of the factor for commissions and other advances and charges; and it is therefore the factor's duty to account to his principal for all property or money of the principal that he gets possession of, as factor, after deducting what is due to himself in the way of commissions or reimbursement.²²⁹ And this extends, as in other agencies, not only to all profits made by the factor while acting within the course of his employment, but also to profits made in unauthorized acts for his principal's benefit. A factor, like other agents, will not be permitted to use his authority, as factor, for his own benefit or profit, but will have to account to his principal for all such.²³⁰ Thus, as has been seen in a previous section, a factor cannot himself be buyer where he is employed as seller, nor can he be seller where he is employed as buyer, and if he does so the principal can either affirm the sale and compel the factor to pay the purchase-price, or he can repudiate the sale and compel the factor to return the goods.²³¹

(c) **Who may call factor to account.**—Generally the principal is the proper party to call a factor to account, but there may be cases in which this right would belong to others. Thus, the pledgee is the proper party to call a factor to

²²⁸ *Consequa v. Fanning*, 3 Johns. Ch. (N. Y.) 587; *Boyle v. Zacharie*, 6 Pet. (U. S.) 635; *Ward v. Vosburgh*, 31 Fed. 12; *Grant v. Healey*, 3 Sumn. 523, Fed. Cas. No. 5,696; *Lanusse v. Barker*, 3 Wheat. (U. S.) 101; *Ballister v. Hamilton*, 3 La. Ann. 401; *Bush v. Nance*, 61 Miss. 237; *Coolidge v. Poor*, 15 Mass. 427.

²²⁹ *Britton v. Ferrin*, 171 N. Y. 235; *Terwilliger v. Beals*, 6 Lans. (N. Y.) 403; *Armour v. Gaffey*, 30 App. Div. 121, 165 N. Y. 630; *Stirneman v. Smith*, 100 Fed. 600; *Warriner v. People*, 74 Ill. 346; *Keighler v. Savage Mfg. Co.*, 12 Md. 383, 71 Am. Dec. 600; *Curtis v. Gibney*, 59 Md. 131. See *Tucker v. Utley*, 168 Mass. 415.

²³⁰ *Payne v. Waterston*, 16 La. Ann. 239; *Hidden v. Waldo*, 55 N. Y. 294.

²³¹ *Ante*, § 848.

account, where he receives the goods with the understanding that he should dispose of them through a factor, and credit the debtor with the amount of sales, and he accordingly commits them to a factor, from whom he takes a receipt.²³² The amount due from the factor is in the nature of a fund provided for the pledgee's benefit by the pledgor, and which the pledgee is not at liberty to wholly disregard and claim the entire balance of his debt as if no means of satisfaction had ever been at his command, where he has the superior right to pursue the fund by virtue of an understanding that the goods received by him should be disposed of through a factor and the debtor credited with the amount of sales.²³³

§ 853. Duty in caring for funds.

A factor is not required to keep money received from the sale of goods of different consignors in separate and distinct parcels, but may mingle it all in one mass, and with his own private funds. In such case, the factor becomes at once a debtor to his principal, and is liable to an action for the balance shown to be due by his account of sales, immediately after its rendition and without any previous demand.²³⁴ Thus commission merchants having a lien upon moneys received as proceeds of goods consigned to them for sale to secure themselves against loss upon acceptances and indorsements for the consignors may mingle such moneys with other funds in their hands, without being guilty of misappropriating it;²³⁵ and where they have done so, the subsequent assignment of their estate in insolvency will not enable the consignors to maintain an action against them therefor, during the continuance of their liability upon the acceptances and indorsements.²³⁶ But where a factor deposits the principal's funds in a bank in his own name and without in any

²³² *Bigelow v. Walker*, 24 Vt. 149, 58 Am. Dec. 156.

²³³ *Bigelow v. Walker*, 24 Vt. 149, 58 Am. Dec. 156.

²³⁴ *Vail v. Durant*, 7 Allen (Mass.) 408, 83 Am. Dec. 695; *Clark v. Moody*, 17 Mass. 145; *Snell v. State*, 50 Ga. 219; *In re Farrell's Estate*, 17 Pa. Super. Ct. 240. Compare *Pinckney v. Dunn*, 2 Rich. (S. C.) 314.

²³⁵ *Vail v. Durant*, 7 Allen (Mass.) 408, 83 Am. Dec. 695.

²³⁶ *Vail v. Durant*, 7 Allen (Mass.) 408, 83 Am. Dec. 695.

manner indicating that they are his principal's funds, he is liable for their loss in case of the insolvency of the bank.²³⁷

A factor in possession of funds belonging to his principal, when there is nothing in the contract or the custom of the place requiring that the funds should be paid over at any particular time, cannot set up title to such funds without notice to the principal that he no longer holds them for his benefit. The statute of limitations does not begin to run in his favor until such notice, or until there has been a demand and refusal to pay, or an account rendered accompanied by an offer to settle.²³⁸

§ 854. In caring for goods.

It is also a factor's duty to use a reasonable degree of care and diligence in caring for property which has been consigned to him for sale. If he does not do so he will be liable to his principal for any loss that may be caused by his negligence; or if he does use such diligence and skill he will not be liable for any loss that may follow, not due to negligence on his part.²³⁹ A factor will not be deemed to have acted negligently in such cases if he stored and cared for goods consigned to him, in the usual and customary manner, used by persons of ordinary prudence and diligence, under like circumstances.²⁴⁰ Thus a factor to whom wheat is consigned for storage in an elevator, and for sale, may store it in a mass in a bin with other wheat of the same grade and quality, in the absence of instructions from the consignor to the contrary, where such is the usual and customary man-

²³⁷ *Cartmell v. Allard*, 7 Bush (Ky.) 482.

²³⁸ *Teasley v. Bradley*, 110 Ga. 497, 78 Am. St. Rep. 113.

²³⁹ *Foster v. Bush*, 104 Ala. 662; *Whittingham v. Owen*, 19 D. C. 277; *Weaver v. Poyer*, 70 Ill. 567; *Dunbar v. Gregg*, 44 Ill. App. 527; *Bartle v. Phelps*, 39 Iowa, 498; *Chenowith v. Dickinson*, 8 B. Mon. (Ky.) 156; *Hill v. White*, 11 La. Ann. 170; *Colley v. Merrill*, 6 Me. 50; *Jones v. Sinclair*, 2 N. H. 319, 9 Am. Dec. 75; *Vandyke v. Brown*, 8 N. J. Eq. 657; *Huguenin v. Legare*, 11 Rich. Law (S. C.) 204; *Vincent v. Rather*, 31 Tex. 77, 98 Am. Dec. 516; *Wilkinson v. Williams*, 35 Tex. 181. See *Barrows v. Cushway*, 37 Mich. 481.

²⁴⁰ *Davis v. Kobe*, 36 Minn. 214, 1 Am. St. Rep. 663; *Phillips v. Moir*, 69 Ill. 155; *Trumbull v. Union Trust Co.*, 33 Ill. App. 319; *Wallace v. Bradshaw*, 6 Dana (Ky.) 382.

ner of storing it.²⁴¹ But if a factor unlawfully mixes and confuses his own goods with those of his principal so that they cannot be distinguished, the latter will be entitled to the whole.²⁴²

If the principal has specially instructed the factor in regard to the manner of caring for the goods, or has shipped them to a particular factor, relying upon the representation of the latter that they will be cared for in a certain manner, it is the duty of the factor to follow such instructions or representations, and for a failure to do so he will be liable for the resulting loss, unless sufficiently excused.²⁴³ Nor can he defend his actions in failing to comply with such directions or representations, by showing a custom among factors to care for the goods in a different manner.²⁴⁴ Thus where a commission merchant advertises that goods consigned to him will be stored in a fire-proof house, he is liable if he stores them in a wooden house which is less safe, and afterwards burned, and this is true even though the goods were shipped to and stored in the warehouse of the wrong consignee, if, after the discovery of the mistake by the real consignee, he allows the goods to remain in such warehouse.²⁴⁵ Nor can the factor defend an action against him for the loss of the goods, caused by allowing them to remain in a warehouse less secure than his own, on the ground that it was the custom among factors that when goods are placed in a warehouse, other than the particular one to which they are consigned, to allow them to remain there.²⁴⁶

But although a factor "may properly be held responsible for a neglect to provide against the risks or perils to which property entrusted to his care may, in the ordinary course of business, be exposed, he cannot be held liable for not an-

²⁴¹ *Davis v. Kobe*, 36 Minn. 214, 1 Am. St. Rep. 663.

²⁴² *First Nat. Bank of Elgin v. Schween*, 127 Ill. 573, 11 Am. St. Rep. 174.

²⁴³ *Vincent v. Rather*, 31 Tex. 77, 98 Am. Dec. 516. See, also, *Ferguson v. Porter*, 3 Fla. 27; *Rapp v. Grayson*, 2 Blackf. (Ind.) 130.

²⁴⁴ *Vincent v. Rather*, 31 Tex. 77, 98 Am. Dec. 516.

²⁴⁵ *Vincent v. Rather*, 31 Tex. 77, 98 Am. Dec. 516.

²⁴⁶ *Vincent v. Rather*, 31 Tex. 77, 98 Am. Dec. 516.

icipating a danger altogether out of the ordinary course of business or of natural events."²⁴⁷

§ 855. In remitting.

Where a factor has sold the goods consigned to him for sale and has received the proceeds thereon, and has apprised the principal of that fact he may, in the absence of instructions or usage otherwise, wait until he receives directions from his principal as to the mode of remitting the net proceeds;²⁴⁸ and if he remits before he receives such instructions, he does so at his own risk, and generally will be liable for any loss that may be occasioned thereby.²⁴⁹ But if the principal has given him special instructions in reference to the remittance of proceeds it is his duty to follow them, and to remit in the manner so ordered; and if he uses due diligence and skill in so doing, he cannot be held liable for any ensuing loss.²⁵⁰ Thus, if the factor, according to instructions, makes his remittance with due diligence and in good faith by means of a bill of exchange, he will not be responsible for the loss if the bill is protested or dishonored,²⁵¹ and if the principal generally instructs the factor to remit proceeds received on a sale, the latter will be relieved from responsibility if he remits in the manner usually employed by

²⁴⁷ *Johnson v. Martin*, 11 La. Ann. 27, 66 Am. Dec. 193.

²⁴⁸ *Ferris v. Paris*, 10 Johns. (N. Y.) 285; *Cooley v. Betts*, 24 Wend. (N. Y.) 203; *Greentree v. Rosenstock*, 61 N. Y. 583; *Halden v. Crafts*, 4 E. D. Smith (N. Y.) 490; *Brink v. Dolsen*, 8 Barb. (N. Y.) 337; *Middleton v. Twombly*, 125 N. Y. 520.

²⁴⁹ *Clark v. Moody*, 17 Mass. 145; *Lucas v. Groning*, 1 Starkie, 391; *Johnson v. Martin*, 11 La. Ann. 27, 66 Am. Dec. 193; *Heubach v. Rother*, 9 N. Y. Super. Ct. (2 Duer) 227; *Halden v. Crafts*, 4 E. D. Smith (N. Y.) 490; *Smith v. Ward*, 3 La. Ann. 76; *Rourk v. Pegram*, 10 La. Ann. 394.

²⁵⁰ *Heubach v. Rother*, 9 N. Y. Super. Ct. (2 Duer) 227; *Ferris v. Paris*, 10 Johns. (N. Y.) 285; *Muller v. Bohlens*, 2 Wash. C. C. 378, Fed. Cas. No. 9,914.

²⁵¹ *Muller v. Bohlens*, 2 Wash. C. C. 378, Fed. Cas. No. 9,914; *Heubach v. Rother*, 9 N. Y. Super. Ct. (2 Duer) 227; *Leverick v. Meigs*, 1 Cow. (N. Y.) 645; *Chandler v. Hogle*, 58 Ill. 46; *Potter v. Morland*, 3 Cush. (Mass.) 384; *Byers v. Harris*, 9 Heisk. (Tenn.) 652. Compare *Akin v. Bedford*, 5 Mart. (N. S.; La.) 502; *Cartmell v. Allard*, 7 Bush (Ky.) 482; *Rourk v. Pegram*, 10 La. Ann. 394.

other factors at the same time and place.²⁵² But if the money is lost by his remitting it in a manner different from that directed by his principal he will be liable for its loss.²⁵³ So if the factor agrees to remit to his principal, within a fixed period after each sale, and fails to do so the principal could sue for the proceeds of sales, without a prior demand.²⁵⁴ If the principal's instructions are ambiguous and capable of two constructions, one of which the factor in good faith pursues, he will not be liable for a loss, because it was the intention of the principal that he should have remitted in the other manner.²⁵⁵

§ 856. In regard to time of sale.

In the absence of instructions to the contrary, it is the duty of a factor to exercise a reasonable degree of discretion and judgment in selling property consigned to him, within a reasonable time after he has received the same.²⁵⁶ If he does so, he will have performed his duty, and cannot be held liable by reason of the fact that by holding the goods longer, a greater price could have been received for them.²⁵⁷ Nor would he be liable for a loss occasioned to the goods, by some accident or other cause not his own, where he has not delayed an unreasonable time in selling them.²⁵⁸ But if,

²⁵² *Potter v. Morland*, 3 Cush. (Mass.) 388; *Chandler v. Hogle*, 58 Ill. 46; *Earnest v. Stroller*, 2 McCrary, 380, Fed. Cas. No. 4,520; *Goldsmith v. Manheim*, 109 Mass. 187.

²⁵³ *Kerr v. Cotton*, 23 Tex. 411; *Foster v. Preston*, 8 Cow. (N. Y.) 198. See *Parker v. Harrison*, 26 La. Ann. 751.

²⁵⁴ *Haebler v. Luttgen*, 158 N. Y. 693.

²⁵⁵ *Hays v. Warren*, 46 Mo. 189. See, also, *Yon v. Blanchard*, 75 Ga. 519.

²⁵⁶ *Comer v. Way*, 107 Ala. 300, 54 Am. St. Rep. 93; *Atkinson v. Burton*, 4 Bush (Ky.) 299; *Seibert's Assignee v. Albritton*, 19 Ky. L. R. 402, 40 S. W. 698; *Cotton v. Hiller*, 52 Miss. 13; *Benedict v. Inland Grain Co.*, 80 Mo. App. 449; *Given v. Lemoine*, 35 Mo. 110; *Prokop v. Gourlay* (Neb.) 91 N. W. 290; *Milbank v. Dennistoun*, 23 N. Y. Super. Ct. 382; *Spruill v. Davenport*, 116 N. C. 34. See *Usborne v. Stephenson*, 36 Or. 328, 78 Am. St. Rep. 778.

²⁵⁷ *Given v. Lemoine*, 35 Mo. 110; *Ward v. Bledsoe*, 32 Tex. 251.

²⁵⁸ *Lehman v. Pritchett*, 84 Ala. 512; *Dunbar v. Gregg*, 44 Ill. App. 527 (loss caused by act of God).

on the other hand, he unreasonably delays in selling, without a sufficient excuse therefor, he will be liable for any loss to the goods, as by their depreciating in value, or otherwise.²⁵⁹

If, however, he has been expressly instructed as to the time of sale he must obey such instructions, and sell at that time;²⁶⁰ unless he has made advances upon the goods consigned to him, and it becomes necessary to dispose of them, in order to protect himself against loss.²⁶¹

§ 857. In regard to place of sale.

Where a consignment is made to a factor for sale, unaccompanied with instructions from the principal, and in the absence of an established usage of trade to the contrary, the presumption is that the goods are to be sold at the place of business of the factor, and it is his duty to sell them at that place, and not to reship them to another market for sale.²⁶² The intent of the principal, which in such a case is to be gathered from the circumstances, alone fixes the character of the

²⁵⁹ *Atkinson v. Burton*, 4 Bush (Ky.) 299; *Francis v. Castleman*, 4 Bibb (Ky.) 282; *Selbert's Assignee v. Albritton*, 19 Ky. L. R. 402, 40 S. W. 698; *Porter v. Blood*, 5 Pick. (Mass.) 54; *Merle v. Hascall*, 10 Mo. 406; *Bernet v. Hockaday*, 61 Mo. App. 627; *Roberts v. Cobb*, 76 Minn. 420.

²⁶⁰ *Day v. Crawford*, 13 Ga. 508; *Pulsifer v. Shepard*, 36 Ill. 513; *Cothran v. Ellis*, 107 Ill. 413; *Maggoffin v. Cowan*, 11 La. Ann. 554; *Howland v. Davis*, 40 Mich. 545; *Evans v. Root*, 7 N. Y. 186, 57 Am. Dec. 512; *Bell v. Palmer*, 6 Cow. (N. Y.) 128; *Symington v. McLin*, 18 N. C. (1 Dev. & B.) 291; *Spruill v. Davenport*, 116 N. C. 34; *Johnson v. Wade*, 2 Baxt. (Tenn.) 480; *Strong v. Stewart*, 9 Heisk. (Tenn.) 137; *Courcier v. Ritter*, 4 Wash. C. C. 549, Fed. Cas. No. 3,282.

²⁶¹ *Phillips v. Scott*, 43 Mo. 86, 97 Am. Dec. 369; *Lockett v. Baxter*, 3 Wash. T. 350; *Field v. Farrington*, 10 Wall. (U. S.) 141.

²⁶² *Catlin v. Bell*, 4 Camp. 183; *Comer v. Way*, 107 Ala. 300, 54 Am. St. Rep. 93; *Phy v. Clark*, 35 Ill. 377; *Kelley v. Maguire*, 99 Ill. App. 317; *Wallace v. Bradshaw*, 6 Dana (Ky.) 382; *Marr v. Barrett*, 41 Me. 403; *Phillips v. Scott*, 43 Mo. 86, 97 Am. Dec. 369; *Burke v. Frye*, 44 Neb. 223; *Grieff v. Cowguill*, 2 Disn. (Ohio) 58; *Wooters v. Kaufman*, 43 Tex. 395; *Kauffman v. Beasley*, 54 Tex. 563. It has been held, however, that factors may, by custom, send goods to other places for sale. *Wallace v. Bradshaw*, 6 Dana (Ky.) 382.

contract between the parties as to the place of sale, and the factor is not at liberty to disregard it.²⁶³ If a factor re-ships goods consigned to him by his principal, without the latter's advice, and they are sold at less than they might have been sold for at the place of shipment, where, in the contemplation of the parties, they were designed to be sold, he is liable for the difference in price for which they were sold and the market value at the place where it was intended that they should be sold.²⁶⁴ Any usage to the contrary, to be of any avail, should be so general and well established that it may be presumed to have entered into the contract, or to have been brought to the actual knowledge of the principal.²⁶⁵

But where the factor has made advances upon the consignment, and the disposal thereof becomes necessary to protect himself, he has entire discretion as to place of sale, and is not even limited by positive instructions.²⁶⁶ If, however, such necessity is intended to be relied upon as a defense, it should be properly pleaded, and the burden of proof is on the factor to show such necessity.²⁶⁷

§ 858. In regard to price of goods sold.

There is an implied agreement that a factor will sell goods consigned to him to the best advantage;²⁶⁸ and where there are no special instructions otherwise, it is his duty to sell for the fair value or market price. If he does not do so but sells or falsely accounts for them at an underprice, he is liable to make additional compensation for the property.²⁶⁹ But if he acts in good faith, and uses a reasonable degree

²⁶³ *Phillips v. Scott*, 43 Mo. 86, 97 Am. Dec. 369.

²⁶⁴ *Comer v. Way*, 107 Ala. 300, 54 Am. St. Rep. 93; *Grieff v. Cowgull*, 2 Disn. (Ohio) 58.

²⁶⁵ *Phillips v. Scott*, 43 Mo. 86, 97 Am. Dec. 369.

²⁶⁶ *Phillips v. Scott*, 43 Mo. 86, 97 Am. Dec. 369.

²⁶⁷ *Phillips v. Scott*, 43 Mo. 86, 97 Am. Dec. 369.

²⁶⁸ *Vincent v. Rather*, 31 Tex. 77, 98 Am. Dec. 516.

²⁶⁹ *Bigelow v. Walker*, 24 Vt. 149, 58 Am. Dec. 156; *Milbank v. Dennistoun*, 23 N. Y. Super. Ct. 382; *Pugh v. Porter Bros. Co.*, 118 Cal. 628; *Merle v. Hascall*, 10 Mo. 406; *Govan v. Cushing*, 111 N. C. 458.

of care and skill, he cannot be held liable, because he failed to sell for more than the market price.²⁷⁰ If the principal's instructions expressly limit the price at which the goods are to be sold it is the factor's duty to sell at that price, and, generally, he will be liable to his principal for any loss that may result from his failure to do so.²⁷¹ Or if there is an express agreement or guaranty by the factor to sell for a certain price, he will be liable if he sells below that price although he sells at the market price.²⁷² And where he guaranties to his principal that the goods shall sell at a fixed profit, he is liable to the principal for that profit, irrespective of the market value of the goods.²⁷³ But if the factor has made advances upon the consignment, and it becomes necessary to sell in order to protect himself, he has entire discretion as to the price, although he has had positive instructions thereon from his principal.²⁷⁴

§ 859. In selling to responsible persons.

It is a factor's duty, in selling his principal's goods, to use a reasonable degree of diligence and prudence in selling to such persons only as are responsible. While he cannot be held as a guarantor of the responsibility of the persons to

²⁷⁰ *Conway v. Lewis*, 120 Pa. 215, 6 Am. St. Rep. 700; *Mann v. Laws*, 117 Mass. 293; *Ward v. Bledsoe*, 32 Tex. 251.

²⁷¹ *Levison v. Balfour*, 34 Fed. 382; *Loraine v. Cartwright*, 3 Wash. C. C. 151, Fed. Cas. No. 8,500; *Union Hardware Co. v. Plume & A. Mfg. Co.*, 58 Conn. 219; *Polindexter v. King*, 21 La. Ann. 697; *Cotton v. Hiller*, 52 Miss. 7; *Switzer v. Connett*, 11 Mo. 88; *Blot v. Boiceau*, 3 N. Y. 78, 51 Am. Dec. 345; *Taylor v. Ketchum*, 28 N. Y. Super. Ct. 507; *Comley v. Dazian*, 114 N. Y. 161; *Guy v. Oakley*, 13 Johns. (N. Y.) 332; *Dusar v. Perit*, 4 Bin. (Pa.) 361; *Porter v. Patterson*, 15 Pa. 229. And see *Osburn v. Delafield*, 75 Hun (N. Y.) 246.

²⁷² *Harrison v. Glover*, 4 Hun (N. Y.) 121; *Lehmann v. Schmidt*, 87 Cal. 15; *Dalton v. Goddard*, 104 Mass. 497; *In re Holt's Estate*, 4 Del. Co. R. (Pa.) 363; *Mackenzie v. Hodgkin*, 126 Cal. 591, 77 Am. St. Rep. 209.

²⁷³ *Pugh v. Porter Bros. Co.*, 118 Cal. 628. Compare *Wise-Kottwitz Commission Co. v. Bond* (Tenn. Ch. App.) 47 S. W. 174.

²⁷⁴ *Phillips v. Scott*, 43 Mo. 86, 97 Am. Dec. 369; *Columbian Nat. Bank v. White*, 65 Mo. App. 677; *Cotton v. Hiller*, 52 Miss. 7. And see *Osburn v. Delafield*, 75 Hun (N. Y.) 246.

whom he sells in the ordinary course of business, and in accordance with the usages of the market where the sale takes place, nevertheless, he must use all reasonable efforts and resort to all reasonably available sources of information, to learn the pecuniary liability of the purchaser, and if he does not do so, and any loss occurs by reason thereof, he will be liable therefor.²⁷⁵ It would be otherwise, however, if he had exercised due diligence and prudence, in that respect, and the loss afterwards occurs, without any negligence on his part.²⁷⁶ If, after a principal learns that a sale negotiated by his factor cannot be carried out on account of the irresponsibility of the buyer, he fails to take steps to protect himself, the factor is not further liable for the loss, from a falling market, occurring on account of such failure.²⁷⁷

A factor is not, in the absence of an express agreement, a guarantor of payment, and is not liable to his principal for the entire amount that would have been realized had a sale which failed through the factor's negligence been completed.²⁷⁸ He may, however, make himself liable as a guarantor of the responsibility of a purchaser by entering into an express agreement to that effect, as in the case of a *del credere* factor, as we shall see in a subsequent section. So where a factor, who is authorized to sell on credit, is instructed or expressly agrees to sell only to responsible persons, he stands in the position of a guarantor and will be responsible

²⁷⁵ *Forrestier v. Bordman*, 1 Story, 43, Fed. Cas. No. 4,945; *Burrill v. Phillips*, 1 Gall. 360, Fed. Cas. No. 2,200; *Marshall v. Williams*, 2 Biss. 255, Fed. Cas. No. 9,136; *Foster v. Waller*, 75 Ill. 464; *Western Union Cold Storage Co. v. Winona Produce Co.*, 84 Ill. App. 678, 94 Ill. App. 618; *Durant v. Fish*, 40 Iowa, 559; *M. M. Walker Co. v. Dubuque Fruit & Produce Co.*, 113 Iowa, 428, 53 L. R. A. 775; *Bonham v. Overton*, 6 La. Ann. 765; *Pinkham v. Crocker*, 77 Me. 563; *Hapgood v. Batcheller*, 4 Metc. (Mass.) 573; *Housel v. Thrall*, 18 Neb. 484.

²⁷⁶ *Greely v. Bartlett*, 1 Me. 172, 10 Am. Dec. 54; *James v. McCredie*, 1 Bay (S. C.) 294, 1 Am. Dec. 617; *Goodenow v. Tyler*, 7 Mass. 36, 5 Am. Dec. 22.

²⁷⁷ *Western Union Cold Storage Co. v. Winona Produce Co.*, 84 Ill. App. 678.

²⁷⁸ *Western Union Cold Storage Co. v. Winona Produce Co.*, 84 Ill. App. 678.

for a loss resulting by reason of the irresponsibility of the purchaser.²⁷⁹

§ 860. In collecting.

Where a factor, by authority, has made a sale on credit, it is his duty to use a reasonable degree of care and diligence to collect the same when due. If he does so, and yet is unable to collect the debt, he will not be liable for the amount thereof unless he has been acting under a *del credere* commission, or unless he expressly guarantees its collection. But if the debt be lost through the inattention or negligence of the factor in not collecting it, when it is in his power to do so, he will be liable for the loss caused by his negligence.²⁸⁰ Thus, a factor is not liable for a failure to collect the amount of a purchaser's note, unless he has become a guarantor of it, or has been guilty of negligence.²⁸¹ A factor may, however, by contract, guarantee the collection of the price of goods to be sold, and also that their sale shall realize certain sums.²⁸²

But he cannot collect proceeds of a sale against the will of the owner, where he ships the goods in his own name, to another market to be sold by a subagent, as, after the sale, the subagent is the debtor and not the trustee of the principal.²⁸³

²⁷⁹ *Clark v. Roberts*, 26 Mich. 506.

²⁸⁰ *Varden v. Parker*, 2 Esp. 710; *Forrestier v. Bordman*, 1 Story, 43, Fed. Cas. No. 4,945; *Leach v. Bush*, 57 Ala. 145; *Gilly v. Logan*, 2 Mart. (N. S.; La.) 196; *Kinney v. Crane*, 17 La. (O. S.) 417; *Greely v. Bartlett*, 1 Me. 172, 10 Am. Dec. 54; *Folsom v. Mussey*, 8 Me. 400, 23 Am. Dec. 522; *Pinkham v. Crocker*, 77 Me. 563; *Ewalt v. Harding*, 16 Md. 160; *Goodenow v. Tyler*, 7 Mass. 36, 5 Am. Dec. 22; *Fick v. Runnels*, 48 Mich. 302; *Arrott v. Brown*, 6 Whart. (Pa.) 9; *McConnico v. Curzen*, 2 Call (Va.) 358, 1 Am. Dec. 540.

²⁸¹ *Folsom v. Mussey*, 8 Me. 400, 23 Am. Dec. 522.

²⁸² *First Nat. Bank of Elgin v. Schween*, 127 Ill. 573, 11 Am. St. Rep. 174; *Pugh v. Porter Bros. Co.*, 118 Cal. 628. In commercial transactions the house that receives and sells any commodity for another party guarantees the price, less the agreed commissions, but gives no security to make the guaranty good. The responsibility of the house, and of every member of it, is pledged to the consignor, and their credit is accepted as satisfactory when the consignment is made. *Gould v. Lee*, 55 Pa. 99.

²⁸³ *Jackson Ins. Co. v. Partee*, 9 Heisk. (Tenn.) 296.

§ 861. Actions against factor—Necessity for demand by principal.

Before the principal can maintain an action against his factor for a failure to account or remit, he must have made a demand on the factor for the same, or he must have instructed the latter to account or remit, and he has failed to do so;²⁸⁴ unless a demand is impracticable, as where the factor is a foreign one;²⁸⁵ or unless an unreasonable length of time has elapsed since the sale without the factor rendering any account or making any remittance;²⁸⁶ or unless the usual course of dealing between the parties, or usage, imposes upon the factor the duty of remitting.²⁸⁷ So if the factor has properly rendered an account of sales, he is not liable for interest on money in his hands, until a demand therefor has been made, unless a special usage to that effect is shown, or there is a failure to remit according to instructions.²⁸⁸ But

²⁸⁴ *Topham v. Braddick*, 1 Taunt. 572; *Tyree v. Parham's Ex'r*, 66 Ala. 424; *Martin v. Webb*, 5 Ark. 72, 39 Am. Dec. 363; *Kane v. Cook*, 8 Cal. 449; *Deshler v. Beers*, 32 Ill. 368, 83 Am. Dec. 274; *Haas v. Damon*, 9 Iowa, 589; *Jellison v. Lafonta*, 19 Pick. (Mass.) 244; *Burton v. Collin*, 3 Mo. 315; *Cockrill v. Kirkpatrick*, 9 Mo. 697; *Burns v. Pillsbury*, 17 N. H. 66; *Ferris v. Paris*, 10 Johns. (N. Y.) 285; *Cooley v. Betts*, 24 Wend. (N. Y.) 203; *Baird v. Walker*, 12 Barb. (N. Y.) 298; *Middleton v. Twombly*, 125 N. Y. 525. Where a factor sold part of goods consigned to him, and while in possession of the remainder, and with a right to sell them, sued his principal for commissions, a demand for such goods, contained in a letter delivered to him, the contents of which he did not know until the person delivering it had departed, and when the goods, with the knowledge of the principal, are 3,000 miles away, does not constitute such a demand and refusal as to render such factor guilty of conversion of the unsold goods. *Parmenter v. American Box Mach. Co.*, 44 App. Div. (N. Y.) 47.

²⁸⁵ *Clark v. Moody*, 17 Mass. 145; *Eaton v. Welton*, 32 N. H. 352.

²⁸⁶ *Eaton v. Welton*, 32 N. H. 352; *Langley v. Sturtevant*, 24 Mass. 214; *Brink v. Dolsen*, 8 Barb. (N. Y.) 337; *Deshler v. Beers*, 32 Ill. 368, 83 Am. Dec. 275 (or denies the principal's rights in the premises).

²⁸⁷ *Middleton v. Twombly*, 125 N. Y. 520; *Brink v. Dolsen*, 8 Barb. (N. Y.) 337.

²⁸⁸ *Tyree v. Parham's Ex'r*, 66 Ala. 424; *Ellery v. Cunningham*, 1 Metc. (Mass.) 112; *Cheesborough v. Hunter*, 1 Hill (S. C.) 400; *Wetmore v. Woodhouse*, 10 Tex. 33; *McConnico v. Curzen*, 2 Call

it has been held that, after the rendition of an account, the factor becomes a debtor to his principal, and is liable to an action for a balance due, without any previous demand.²⁸⁹

— **Conversion.** And to render a factor liable for conversion of goods, demand must be made while the property or its proceeds are in his hands, or it must be shown that he had notice of the owner's rights, or of the want of title in the party placing the goods in his hands.²⁹⁰ But in order to constitute conversion by factors, it is not necessary that they should have exercised complete manual control of the property, if they intermeddled with it and exercised dominion over it; nor is it necessary that they should have appropriated to their own use the proceeds of the sale of the property.²⁹¹ Thus, if a factor sells the property of his principal, after he had been notified of the sale of the property to another, and after the offer to pay all charges against the property, he would be guilty of conversion.²⁹² So if he accounts for goods as sold which are in fact unsold, and which the factor has under his control, he will be guilty of conversion, and the principal may reclaim the same, although a settlement was had between them, previous to the discovery, by the principal, of the unsold goods.²⁹³ And if the factor deals with the principal's goods, contrary to his authority, he is guilty of a conversion of the goods, and the principal may maintain an action of trover against him therefor.²⁹⁴

(Va.) 358, 1 Am. Dec. 540. Compare *Newman v. Homans*, Quincy (Mass.) 5.

²⁸⁹ *Vail v. Durant*, 7 Allen (Mass.) 408, 83 Am. Dec. 695; *Clark v. Moody*, 17 Mass. 145; *Dodge v. Perkins*, 9 Pick. (Mass.) 368.

²⁹⁰ *Roach v. Turk*, 9 Helsk. (Tenn.) 708, 24 Am. Rep. 360; *Abernathy v. Wheeler*, 92 Ky. 320, 36 Am. St. Rep. 593; *Marr v. Barrett*, 41 Me. 403; *Jones v. Hodgkins*, 61 Me. 480; *First Nat. Bank v. Crocker*, 111 Mass. 163; *Wagenblast v. McKean*, 2 Grant Cas. (Pa.) 393. Demand is not necessary where the factor pledges the goods for his own debt. *Merchants' Nat. Bank v. Trenholm*, 12 Helsk. (Tenn.) 520; *Kennedy v. Strong*, 14 Johns. (N. Y.) 128.

²⁹¹ *Arkansas City Bank v. Cassidy*, 71 Mo. App. 186.

²⁹² *M. M. Walker Co. v. Dubuque Fruit & Produce Co.*, 106 Iowa, 245. See, also, *Lehmann v. Schmidt*, 87 Cal. 15.

²⁹³ *Gay v. D. M. Osborne & Co.*, 102 Wis. 641.

²⁹⁴ *Kelly v. Smith*, 1 Blatchf. 290, Fed. Cas. No. 7,675; *Scott v.*

— **Money had and received.** As long as the factor retains his principal's goods, unsold, an action for money had and received will not lie against him;²⁹⁵ but if the factor has sold the goods and does not pay over the proceeds upon demand or within a reasonable time, the principal may maintain such an action of assumpsit against him.²⁹⁶

§ 862. Del credere factors.

(a) **In general.**—Factors under a del credere commission undertake, for an additional compensation, to guarantee to their principals the payment of the purchase-money for goods sold under such commission. A del credere commission is the premium or price given by the principal to the factor for a guaranty.²⁹⁷ This right to a del credere commission exists only when expressly contracted for, and extends only to sales on credit;²⁹⁸ and such contract is a contract of guaranty of the solvency of his vendees, and not of the worth of the bills purchased by him and remitted in payment.²⁹⁹

(b) **Nature of liability.**—There has been much conflict among the decisions, as to the nature and extent of a factor's obligation under such a commission; and while the later English and some American authorities hold that he is liable as surety merely,³⁰⁰ the decided preponderance of authority in

Rogers, 31 N. Y. 676; Comley v. Dazian, 114 N. Y. 161; Haas v. Damon, 9 Iowa, 589; Campbell v. Reeves, 3 Head (Tenn.) 226; Wadsworth v. Gay, 118 Mass. 44.

²⁹⁵ Grover v. Clark, Wright (Ohio) 350.

²⁹⁶ Jones v. Marks, 40 Ill. 313; Taylor v. Turner, 87 Ill. 296; Wadsworth v. Gay, 118 Mass. 44; Tucker v. Utley, 168 Mass. 415; Grover v. Clark, Wright (Ohio) 350.

²⁹⁷ Morris v. Cleasby, 4 Maule & S. 566, 574. Where a contract for the consignment of goods to be sold on commission fixes the price at which they are to be sold, and the consignee guarantees the payment of such prices, the relation thereby established is that of del credere factor and principal, and not that of vendor and vendee. National Cordage Co. v. Sims, 44 Neb. 148.

²⁹⁸ Wittkowski v. Harris, 64 Fed. 712.

²⁹⁹ Sharp v. Emmet, 5 Whart. (Pa.) 288, 34 Am. Dec. 554; Leverick v. Meigs, 1 Cow. (N. Y.) 664; Mackenzie v. Scott, 6 Brown Parl. Cas. 280.

³⁰⁰ Morris v. Cleasby, 4 Maule & S. 566, 574; Hornby v. Lacy, 6 Maule & S. 166; Thompson v. Perkins, 3 Mason, 232, 235, Fed. Cas

the United States follows the earlier English rule, which is to the effect that a factor who sells under a *del credere* commission is absolutely liable, as a principal, to pay the price for which the goods were sold, when the credit has expired; and may be sued in *indebitatus assumpsit* if he does not pay the sale debt when due.³⁰¹ And as the factor's liability, under a

No. 13,972; *Gindre v. Kean*, 7 Misc. (N. Y.) 582, 31 Abb. N. C. 100. In *Hornby v. Lacy*, 6 Maule & S. 166, Lord Ellenborough, C. J., says: "I own I cannot think that a commission *del credere* is to have an effect attributed to it beyond that which regards the benefit of the principal who gives the commission. The commission imports, that if the vendee does not pay, the factor will; it is a guarantee from the factor to the principal against any mischief to arise from the vendee's insolvency. But it varies not an iota the rights subsisting between vendor and vendee." In commenting on *Grove v. Dubois*, 1 Term R. 112, he says: "A kind of magic effect was there given to a *del credere* commission, changing the relative position of the owner and buyer." In the same case Bayley, J., says: "When he—the principal—"gives a *del credere* commission, he means to obtain an additional security; that is, the security of the factor; and it would be extremely hard if, instead of having an additional security, he should find that he had only substituted one for another, that he had shifted the responsibility from the buyer to the factor."

³⁰¹ *Grove v. Dubois*, 1 Term R. 112; *Tustin Fruit Ass'n v. Earl Fruit Co.* (Cal.) 53 Pac. 693; *Aetna Powder Co. v. Hildebrand*, 137 Ind. 462, 45 Am. St. Rep. 194; *Lewis v. Brehme*, 33 Md. 412, 425, 3 Am. Rep. 190; *Swan v. Nesmith*, 7 Pick. (Mass.) 220, 19 Am. Dec. 282; *Cartwright v. Green*, 47 Barb. (N. Y.) 9; *Milliken v. Byerly*, 6 How. Pr. (N. Y.) 214; *Blakely v. Jacobson*, 9 Bosw. (N. Y.) 140; *Balderston v. National Rubber Co.*, 18 R. I. 338, 49 Am. St. Rep. 772.

In *Wolff v. Koppel*, 2 Denio (N. Y.) 368, 43 Am. Dec. 751, Porter, Senator, reviews the leading cases supporting this view, as follows: "In 1786, in the case of *Grove v. Dubois*, 1 Term R. 112, Lord Mansfield, C. J., held that the engagement of a broker, acting under a *del credere* commission, was absolute, and that he was liable in the first instance and at all events. Buller, J., agreed with him fully, and said he had never heard the inquiry made, whether a demand had been made upon the purchaser. We find these two very distinguished judges speaking of this as a familiar principle, and one universally acknowledged and practiced upon. The case of *Scott v. McKenzie*, decided in Scotland in 1795, involved the same principle. The defendant, a factor, acting under a *del credere* commission, at the request of his principal transmitted the proceeds of the sales in a bill on a house in London. The parties to the bill failed before payment. On the question as to the liability of the factor,

del credere commission, is primary, his contract is not such as is required to be in writing by the statute of frauds, as being a

the court in Scotland decided that no payment but such an one as would have satisfied a proper debt, was sufficient to discharge the factor, and gave judgment for the plaintiff. This judgment was affirmed in the house of lords in 1796: 6 Brown Parl. Cas. 280. In *Houghton v. Matthews*, 3 Bos. & P. 489, Chambre, J., says, that where a factor sells under a del credere commission, he becomes responsible for the price, and he is to be considered, as between himself and the vendor, as the sole owner of the goods. In the same case, Lord Alvanley, C. J., says, that the effect of a del credere commission is to make the factor responsible for the value of the goods to his principal.

"Mr. Bell, in his Commentaries, published in 1816, at p. 378, lays down the rule thus: 'The correct legal import of a del credere engagement, is an engagement to be answerable as if the person so binding himself was the proper debtor. This seems to be the correct legal import of the undertaking; and it is as nearly as possible, the meaning of the Italian phrase which we have adopted. He is placed in relation to the principal, precisely in the same situation, as if he had actually received in loan, the money of the principal.' Mr. Comyn, in his treatise on Contracts, vol. 1, p. 253, is equally explicit in his statement of this rule. He says: 'A factor del credere, on the sale of the goods, makes himself absolutely liable in the first instance, for the payment of the price of such goods, in the same manner as if he were himself the purchaser, and was debited for them by the principals as such.' Chancellor Kent, in the first edition of his Commentaries, published in 1826, states his view, at that time, of the law on this point, as follows: 'When a factor acts under a del credere commission for an additional premium he becomes liable to his principal when the purchase money falls due, for he is substituted for the purchaser, and is bound to pay, not conditionally, but absolutely, and in the first instance.' 2 Kent, Comm. (1st Ed.) 487.

"Here we have a whole current of decisions and a coincidence of opinions among eminent authors, in favor of the absolute liability of the factor to pay the price for which goods are sold under such a commission, when the credit has expired. This should, I think, settle the question. But the doctrine has been questioned, and finally overruled in England. * * * I do not find, however, that the recent innovation in England has been adopted in this country, except in *Thompson v. Perkins*, 3 Mason, 232, Fed. Cas. No. 13,972, where Mr. Justice Story has followed the case of *Morris v. Cleasby*. 4 Maule & S. 566. We are now asked to give the new rule the sanction of this court. But in my judgment we should not follow the

promise to answer for the debt, default, or miscarriage of another.³⁰²

(c) **Distinguished from other factors.**—The only difference between a factor acting under a *del credere* commission and without one is as to sales made on credit. In the former case he is absolutely liable and may correctly be said to become the debtor of his principal; but it is not strictly correct to say that he is placed in the same situation as if he had become the purchaser himself; for the principal, notwithstanding this liability, may exercise a control not allowable between debtor and creditor. When the principal appears, the right of the factor to receive payment ceases. The effect of the commission is not to extinguish the relation between principal and factor, but applies solely to the guaranty that the purchaser shall pay.³⁰³ The duties, liabilities, and powers of a *del credere* factor are the same as those of an ordinary factor to his principal.³⁰⁴ A *del credere* factor is not bound, for the purpose of putting his principal in a better position, to insist on acceptance by a

courts in England in their departure from the former rule. This is a class of contracts that have existed in this country as long as commerce has flourished, and under which business is daily transacting to a large amount. The understanding of the mercantile community has, I apprehend, been general and uniform, that the agreement between the principal and factor was original and absolute to pay the price of the sale, deducting the commission, at the time the credit expired. Doubtless the factor expected the fund would be received from the purchaser; but whether received or not, he charges himself with the amount in his account with his principal. A contrary rule would require the principal to exhaust his remedy against the purchaser, in order to determine his insolvency, before he could charge the factor as surety."

³⁰² *Wolff v. Koppel*, 2 Denio (N. Y.) 368, 43 Am. Dec. 751; *Sherwood v. Stone*, 14 N. Y. 268; *Swan v. Nesmith*, 7 Pick. (Mass.) 220, 19 Am. Dec. 232; *Couturier v. Hastie*, 8 Exch. 40; *Tustin Fruit Ass'n v. Earl Fruit Co.* (Cal.) 53 Pac. 693; *Bullowa v. Orgo*, 57 N. J. Eq. 428; *Bradley v. Richardson*, 23 Vt. 720.

³⁰³ *Balderston v. National Rubber Co.*, 18 R. I. 338, 49 Am. St. Rep. 779; *Edwards*, Bailm. § 278, note.

³⁰⁴ *Catterall v. Hindle*, L. R. 1 C. P. 186, 191; *Morris v. Cleasby*, 4 Maule & S. 566; *Thompson v. Perkins*, 3 Mason, 232, Fed. Cas. No. 13,972.

buyer, of goods shown not to be in accordance with the contract.³⁰⁵

(d) **Lien.**—A factor under *del credere* commission has a lien for advances made on goods consigned to him, and delivered to another to hold for him in that character, and may maintain replevin against the bailee for their nondelivery.³⁰⁶ But if a factor selling under a *del credere* commission, receives goods from his principal and makes monthly advances, pursuant to agreement, up to a certain per cent of the market value of the goods consigned for sale, he is not entitled, upon the principal becoming insolvent and making an assignment for the benefit of creditors, to receive from the assignee a dividend upon the whole amount of the advances made and unpaid from the proceeds of goods sold, at the time of the assignment, but only on the balance, if any, that is due after crediting the net proceeds, when sold, of the goods on hand at the date of the assignment.³⁰⁷

§ 863. Duty and liability of factors under bankruptcy law.

A factor is held not to be within the provision of the bankrupt law that all persons "owing debts which shall not have been created in consequence of a defalcation as a public officer, or as executor, administrator, guardian, or trustee, or while acting in any other fiduciary capacity," should be discharged on a compliance with the requisites of the statute. Hence, a debt due from a factor to his principal is not created while acting in a "fiduciary character," and may be discharged in bankruptcy.³⁰⁸ As has been said: "If the

³⁰⁵ *Albion Phosphate Min. Co. v. Wyllie*, 77 Fed. 541.

³⁰⁶ *Holbrook v. Wight*, 24 Wend. (N. Y.) 169, 35 Am. Dec. 607.

³⁰⁷ *Balderston v. National Rubber Co.*, 18 R. I. 338, 49 Am. St. Rep. 772.

³⁰⁸ *Chapman v. Forsyth*, 2 How. (U. S.) 202; *Owsley v. Cobin*, 15 N. B. R. 489, Fed. Cas. No. 10,636; *Neal v. Clark*, 95 U. S. 704; *Noble v. Hammond*, 129 U. S. 67; *Hennequin v. Clews*, 111 U. S. 676; *Woolsey v. Cade*, 54 Ala. 378, 25 Am. Rep. 711; *Austill v. Crawford*, 7 Ala. 335; *Commercial Bank v. Buckner*, 2 La. Ann. 1023; *Desobry v. Tete*, 31 La. Ann. 809, 33 Am. Rep. 232; *Hayman v. Pond*, 7 Metc. (Mass.) 328; *Cronan v. Cotting*, 104 Mass. 245; *Scott v. Porter*, 33 Pa. 38.

act embrace such a debt, it will be difficult to limit its application. It must include all debts arising from agencies; and indeed all cases where the law implies an obligation from the trust reposed in the debtor. Such a construction would have left few debts on which the law could operate. In almost all commercial transactions of the country, confidence is reposed in the punctuality and integrity of the debtor, and a violation of these is, in a commercial sense, a disregard of a trust. But this is not the relation spoken of in the first section of the act. The cases enumerated, 'the defalcation of a public officer,' 'executor,' 'administrator,' 'guardian or trustee,' are not cases of implied but special trusts, and the 'other fiduciary capacity' mentioned, must mean the same class of trusts. The act speaks of technical trusts, and not those which the law implies from the contract. A factor is not therefore within the act."³⁰⁹ Under the act of 1867, a series of diverse rulings by different courts arose on this subject; one class treating agents, factors, commission merchants, etc., as acting in a fiduciary character under the act, on the view that the act was conceived in broader and more general terms than the act of 1841,³¹⁰ but other and later cases, which will be found cited in a preceding note, followed the decision in *Chapman v. Forsyth*, 2 How. (U. S.) 202. Under a similar provision in the late bankruptcy law, which provides that: "A discharge in bankruptcy shall release a bankrupt, from all his provable debts except such as were created by fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary

³⁰⁹ *Chapman v. Forsyth*, 2 How. (U. S.) 202, construing section 1 of Bankrupt Law of 1841.

³¹⁰ See *Lemcke v. Booth*, 47 Mo. 385, 4 Am. Rep. 326; *Brown v. Garrard*, 28 La. Ann. 870; *Banning v. Bleakley*, 27 La. Ann. 257, 21 Am. Rep. 554; *Whitaker v. Chapman*, 3 Lans. (N. Y.) 155; *In re Kimball*, 6 Blatchf. 292, Fed. Cas. No. 7,769; *Hardenbrook v. Collison*, 24 Hun (N. Y.) 475; *In re Seymour*, 1 Ben. 348, Fed. Cas. No. 12,684. *In re Smith*, 18 N. B. R. 24, Fed. Cas. No. 12,976, the United States District Court for the Southern District of New York held a factor's liability was discharged in bankruptcy, and considered that the above cases were overruled by *Neal v. Clark*, 95 U. S. 704.

capacity,"⁸¹¹ the doctrine laid down in *Chapman v. Forsyth*, *supra*, has been followed, and it has been held that a debt arising from the nonpayment by a cotton broker of proceeds from cotton purchased and sold for the bankrupt is dischargeable, as not being a debt created in a fiduciary capacity.⁸¹²

V. RIGHTS OF FACTORS AGAINST PRINCIPAL.

§ 864. Right to compensation—Commissions.

(a) **In general.**—As a general rule, when a factor has properly performed the services which he has undertaken, he is entitled to receive compensation therefor. This compensation usually takes the form of a commission on the proceeds realized from the sale of the goods, effected by the factor. The amount of such commission is determined by an agreement, express or implied, between the factor and his principal, or by commercial usages or customs; or if the factor has not fully completed his services, he may, in some cases, recover on a quantum meruit, for services already performed.⁸¹³ Thus, if the factor has, on his part, complied with all stipulations in the contract of employment, and his services have in fact been the procuring cause of the sale, or have been of benefit to the principal, and the case is taken out of his hands, without any fault of his own, he will be entitled to compensation for services rendered by him, and there is an implied contract on the part of the principal to

⁸¹¹ National Bankruptcy Law of 1898, § 17 a (4).

⁸¹² *Knott v. Putnam*, 6 Am. Bankr. R. 80, reviewing former decisions on this point; *Bracken v. Milner*, 5 Am. Bankr. R. 23. See *Collier, Bankr.* (3d Ed.) pp. 203, 206; *Brandenburg, Bankr.* (2d Ed.) p. 270, § 12.

⁸¹³ *Goddard v. Foster*, 17 Wall. (U. S.) 123; *Albion Phosphate Min. Co. v. Wyllie*, 77 Fed. 541; *Brown v. Harrison*, 17 Ala. 774; *Sawyer v. Lorillard*, 48 Ala. 332; *Brown v. Clayton*, 12 Ga. 564; *Thornhill v. Picard*, 24 La. Ann. 159; *Turnbull v. Pomeroy*, 140 Mass. 117; *Thompson v. Matthews*, 56 Miss. 368; *Trotter v. Curtis*, 19 Johns. (N. Y.) 160, 10 Am. Dec. 211; *Masterson v. Masterson*, 121 Pa. 605. In the absence of an express stipulation as to the price of services in procuring a sale, the factor may recover the customary commissions, though he is not in business as such. *Masterson v. Masterson*, 121 Pa. 605.

pay therefor. If he undertakes to guaranty to his principal the payment of the purchase-money he is entitled to an additional compensation therefor, on account of the risk which he assumes as in the case of a *del credere* commission.³¹⁴ But his right to commission on sales does not give him a right to commission on the amount of the bounty paid by the government to his principal on the goods, as bounty does not represent sales made by the factor.³¹⁵

The factor's right to commissions as a general rule extends only to actual and unconditional sales made by the factor himself,³¹⁶ unless there is an express agreement between the parties giving him a right to commissions on sales made by other agents or the principal.³¹⁷ A factor may charge commissions on bills accepted by him for his principal's accommodation or on advances made, in excess of the interest usually charged on the funds, if such charge is made *bona fide*.³¹⁸

(b) When not entitled to commissions.—Where, however, the factor is guilty of fraud, misconduct, or gross negligence

³¹⁴ See *ante*, § 862. Where a factor, acting on a *del credere* commission, has procured, from other sources, a part of the merchandise necessary to fill a contract which he has made for his principal, but which the principal is unable wholly to fulfill, he is entitled to commissions from the principal on the whole amount of merchandise contracted for. *Albion Phosphate Min. Co. v. Wyllie*, 77 Fed. 541.

³¹⁵ *Romero v. Newman*, 50 La. Ann. 80.

³¹⁶ *Sawyer v. Lorillard*, 48 Ala. 332; *Corlies v. Estes*, 31 Vt. 653; *Lyons v. Lallande*, 9 La. Ann. 601; *Sanderson v. Tinkham Smoke Consumer Co.*, 83 Iowa, 446; *Miller v. Tate*, 12 La. Ann. 160; *Wittkowski v. Harris*, 64 Fed. 712; *Briggs v. Boyd*, 56 N. Y. 289. Commissions cannot be had for making a sale which the factor was not authorized to make, and which the owner rescinded. *Miller v. Price* (Cal.) 39 Pac. 781.

³¹⁷ *Matthews v. Coe*, 70 N. Y. 239; *Thornhill v. Picard*, 24 La. Ann. 159; *Bramblett v. Feltman*, 18 Ky. L. R. 457, 35 S. W. 633.

³¹⁸ *Floyer v. Edwards*, Cowp. 112; *Brown v. Harrison*, 17 Ala. 774; *De Forest v. Strong*, 8 Conn. 513; *Seymour v. Marvin*, 11 Barb. (N. Y.) 80; *Matthews v. Coe*, 70 N. Y. 239; *Trotter v. Curtis*, 19 Johns. (N. Y.) 160, 10 Am. Dec. 211; *Mills v. Johnston*, 23 Tex. 308; *Patterson v. Leake*, 5 La. Ann. 547; *Smetz v. Kennedy*, Riley (S. C.) 218. But see, as to advances, *Cheesborough v. Hunter*, 1 Hill (S. C.) 400; *Keane v. Branden*, 12 La. Ann. 20.

in conducting his principal's business, he can recover no commission or compensation for his services.³¹⁹ So, also, a factor cannot recover the difference, when through his negligence the proceeds of the sale are not equal to the expenses; nor can he recover expenses occasioned by his negligence.³²⁰ Nor will he be entitled to commissions where he fails to keep and render a regular and correct account of his transactions,³²¹ or where he renders fraudulent and false accounts, knowing them to be such,³²² though he cannot be deprived of commissions, on account of an honest mistake in rendering his account.³²³ Nor is he entitled to commissions if he converts to his own use the money which he has collected for the sale of his principal's goods.³²⁴ So where the factor guaranteed his principal that he would receive a certain amount for his goods, he would not be entitled to commissions if the amount of proceeds was not sufficient to pay the amount guaranteed and the commissions too.³²⁵ And, in such cases, not only will the factor not be entitled to any commissions for his services, but he will also be liable to his principal for any loss that the latter may have sustained by reason of his negligence or misconduct.³²⁶ A factor is

³¹⁹ *White v. Chapman*, 1 Starkle, 113; *Fordyce v. Peper*, 16 Fed. 516; *Norman v. Peper*, 24 Fed. 403; *Talcott v. Chew*, 27 Fed. 273; *Brown v. Clayton*, 12 Ga. 564; *Dodge v. Tileston*, 12 Pick. (Mass.) 328; *Brack v. Hart Commission Co.*, 57 Mo. App. 605; *Boston Carpet Co. v. Journeay*, 1 Daly (N. Y.) 190; *Zurn v. Noedel*, 113 Pa. 336; *Campbell v. Angus*, 91 Va. 438. If the factor has so acted in the matter that the principal has to pursue legal remedies in order to recover his proceeds, the factor will be entitled to no commissions. *Vennum v. Gregory*, 21 Iowa, 326.

³²⁰ *Dodge v. Tileston*, 12 Pick. (Mass.) 328.

³²¹ *Smith v. Crews*, 2 Mo. App. 269; *White v. Lincoln*, 8 Ves. 363; *Boston Carpet Co. v. Journeay*, 1 Daly (N. Y.) 190; *Fish v. Seeburger*, 154 Ill. 30.

³²² *Talcott v. Chew*, 27 Fed. 273; *Smith v. Crews*, 2 Mo. App. 269; *Brack v. Hart Commission Co.*, 57 Mo. App. 605.

³²³ *Everingham v. Halsey*, 108 Iowa, 709.

³²⁴ *Brannan v. Strauss*, 75 Ill. 234; *Segar v. Parrish*, 20 Grat. (Va.) 682.

³²⁵ *Dalton v. Goddard*, 104 Mass. 497; *Lehmann v. Schmidt*, 87 Cal. 15; *In re Holt's Estate*, 4 Del. Co. R. (Pa.) 363.

³²⁶ *Segar v. Parrish*, 20 Grat. (Va.) 672.

not entitled to a commission on payment of his own debts to his principal, unless he remits by bills of exchange.³²⁷

As in the case of brokers, a factor is not entitled to commissions when acting for both parties, in the same transaction unless he does so with the knowledge and consent of each.³²⁸

§ 865. Right to reimbursement.

A factor has a right to be reimbursed by his principal for all advances and disbursements made, in good faith, in the course of his employment for such principal, and the principal may be held personally liable therefor.³²⁹ Thus, where a factor has performed his services with due care and skill, and during the course of his employment he has made certain advances on behalf of the principal, he has a right to be reimbursed to the full amount thereof, and he may assert that right against his consignor, giving him credit for the proceeds of the consignment;³³⁰ and as a general rule, a

³²⁷ *Pavret v. Perot*, 2 Yeates (Pa.) 185.

³²⁸ *Talcott v. Chew*, 27 Fed. 273.

³²⁹ *Peyton v. Heinekin*, 131 U. S. (Append.) ci; *Kufeke v. Kehlor*, 19 Fed. 198; *In re Meyer*, 106 Fed. 828; *Mobile & O. R. Co. v. Whitney*, 39 Ala. 468; *Byrne v. Doughty*, 13 Ga. 46; *Brown v. Clayton*, 12 Ga. 564; *Perin v. Parker*, 126 Ill. 201, 9 Am. St. Rep. 571; *Kelley v. Maguire*, 99 Ill. App. 317; *Brander v. Lum*, 11 La. Ann. 217; *Folsom v. Mussey*, 8 Me. 400, 23 Am. Dec. 522; *Talcott v. Smith*, 142 Mass. 542; *Carter v. Cunningham*, 7 Metc. (Mass.) 491; *Dolan v. Thompson*, 126 Mass. 183; *Upham v. Lefavour*, 11 Metc. (Mass.) 174; *Beckwith v. Sibley*, 11 Pick. (Mass.) 482; *Carson v. Alexander*, 34 Miss. 528; *Corlies v. Cumming*, 6 Cow. (N. Y.) 181; *Monnet v. Merz*, 127 N. Y. 151; *Willis v. Thacker*, 20 Tex. Civ. App. 233.

³³⁰ *Adams v. Capron & Co.*, 21 Md. 186, 83 Am. Dec. 566; *Stewart v. Lowe*, 24 U. C. Q. B. 434; *Craig v. Corcoran*, 23 U. C. Q. B. 441; *Cowie v. Apps*, 22 U. C. C. P. 589; *Bradley v. Richardson*, 2 Blatchf. 343, Fed. Cas. No. 1,786; *Burrill v. Phillips*, 1 Gall. 360, Fed. Cas. No. 2,200; *Felsch v. Dickson*, 1 Mason, 9, Fed. Cas. No. 10,911; *Mobile & O. R. Co. v. Whitney*, 39 Ala. 468; *Martin v. Pope*, 6 Ala. 532, 41 Am. Dec. 66; *Brown v. Clayton*, 12 Ga. 564; *Blandford v. Wing Flour Mill Co.*, 24 Ill. App. 596; *Perin v. Parker*, 126 Ill. 201, 9 Am. St. Rep. 571; *Carter v. Cunningham*, 7 Metc. (Mass.) 491; *Barrow v. West*, 23 Pick. (Mass.) 270; *Beckwith v. Sibley*, 11 Pick. (Mass.) 482; *Dolan v. Thompson*, 126 Mass. 183; *Bull v. Sigerson*, 24 Mo. 53;

factor may charge interest on the advances made by him.³³¹ So the principal is bound to reimburse the factor for all expenditures made in good faith and in the exercise of reasonable diligence and skill, on the principal's account, during the course of his employment, and it is not necessary that an express promise to that effect be made before the factor performs his services.³³²

Given v. Lemoine, 35 Mo. 110; *Frothingham v. Everton*, 12 N. H. 239; *Corlies v. Cumming*, 6 Cow. (N. Y.) 181; *Gihon v. Stanton*, 9 N. Y. 476; *Whitman v. Horton*, 46 N. Y. Super. Ct. 535; *Balderston v. National Rubber Co.*, 18 R. I. 338, 49 Am. St. Rep. 772; *Strong v. Stewart*, 9 Heisk. (Tenn.) 137; *Bradley v. Richardson*, 23 Vt. 720. Advances are moneys paid by the factor to his principal on the credit of the goods consigned, and in anticipation of the debt which will become due to the principal upon the sale of such goods. But an advance by a factor does not have the effect of creating a present indebtedness against the consignor. *Balderston v. National Rubber Co.*, 18 R. I. 338, 49 Am. St. Rep. 772.

If commission merchants agree, in writing, to sell a crop of grapes and raisins for a vineyardist, and to make advances thereon, but such advances are in excess of the proceeds of sale, and their assignee brings suit to recover the balance, the defendant may properly file a cross-complaint against the assignors, averring that the money sued for was paid in part performance of their contract with him, and that they are liable to him for any breach of contract upon their part. *Mackenzie v. Hodgkin*, 126 Cal. 591, 77 Am. St. Rep. 209.

³³¹ *Cheesborough v. Hunter*, 1 Hill (S. C.) 400; *Walters v. McGirt*, 8 Rich. Law (S. C.) 287; *Smetz v. Kennedy*, Riley (S. C.) 218; *Sen-tell v. Kennedy*, 29 La. Ann. 679; *Perin v. Parker*, 126 Ill. 201, 9 Am. St. Rep. 571; *Bainbridge v. Wilcocks*, 1 Baldw. 536, Fed. Cas. No. 755; on surplus advanced over cash received, *Howard v. Behn*, 27 Ga. 174. But see *Wittkowski v. Harris*, 64 Fed. 712; *De Hertel v. Supple*, 14 Grant Ch. 421.

³³² *Folsom v. Mussey*, 8 Me. 400, 23 Am. Dec. 522; *Brown v. Clayton*, 12 Ga. 564; *Beach v. Branch*, 57 Ga. 362; *Perin v. Parker*, 126 Ill. 201, 9 Am. St. Rep. 571; *Brander v. Lum*, 11 La. Ann. 217; *Randall v. Kehlor*, 60 Me. 37; *Carter v. Cunningham*, 7 Metc. (Mass.) 491; *Carson v. Alexander*, 34 Miss. 528; *Cooper v. Hong Kong & Shanghai Banking Corp.*, 107 N. Y. 282; *Botany Worsted Works v. Wendt*, 22 Misc. (N. Y.) 156. Where a factor, in order to meet drafts drawn on him by his principal and accepted, sells the goods on credit, and takes a note payable to himself which he indorses and sells for money, and the maker's insolvency compels the factor to pay the note, he may recover the amount so paid from his principal. *Greely v. Bartlett*, 1 Me. 172, 10 Am. Dec. 54.

But where the factor, after an account has been rendered after the sales made, pays the balance of account to his principal, after deducting his advances, for the purpose of closing the accounts between the parties, he thereby assumes the outstanding debts; and consequently the principal is no longer accountable, or bound to refund advances, though the debtors finally fail to pay for goods sold, the proceeds of which were looked to for reimbursement.³³³ The mere giving of a note, however, for a claim due from the factor to the principal, and including therein the amount of an outstanding debt for goods sold on credit, is not such an assumption of the debts by the factor as will prevent his charging against the principal any debts that are not paid, or permit a recovery by the principal upon notes so given.³³⁴

— **Remedies.** Although a factor has, as shall be seen in a subsequent section, a lien on the principal's goods, in his possession, for these advances, yet this lien does not prevent him from taking advantage of a personal claim against the principal for such advances, unless he has agreed to depend upon the lien alone for his reimbursement. Where a factor makes advances, independent of an actual agreement to that effect, the legal inference is that they were made upon the joint credit of the personal security of the principal, and of his goods and money that might come to hand. This being the case, the factor may relinquish his lien on the latter without at all affecting his personal remedy, or he may renounce his personal remedy, and look alone to his lien for reimbursement.³³⁵ It is a right of which the factor or his representatives may avail themselves; but where there is no contract other than that which is implied, one who has become a

³³³ *Oakley v. Crenshaw*, 4 Cow. (N. Y.) 250; *Consequa v. Fanning*, 3 Johns. Ch. (N. Y.) 587.

³³⁴ *Hapgood v. Batcheller*, 4 Metc. (Mass.) 573; *Robertson v. Livingston*, 5 Cow. (N. Y.) 473.

³³⁵ *Martin v. Pope*, 6 Ala. 532, 41 Am. Dec. 66; *Burrell v. Phillips*, 1 Gall. 360, Fed. Cas. No. 2,200; *Pelsch v. Dickson*, 1 Mason, 9, Fed. Cas. No. 10,911; *Stewart v. Lowe*, 24 U. C. Q. B. 434; *Perin v. Parker*, 126 Ill. 201, 9 Am. St. Rep. 571; *Mertens v. Nottebohm*, 4 Grat. (Va.) 163; *Beckwith v. Sibley*, 11 Pick. (Mass.) 482; *Dolan v. Thompson*, 126 Mass. 183; *Upham v. Lefavour*, 11 Metc. (Mass.) 174.

surety of the principal, to refund advances made to him, cannot elect for the factor and force him to assert his lien upon the money or goods of the principal.³³⁶ And, in the absence of an agreement to that effect, the factor need not wait until the goods have been sold, but may compel reimbursement for his advances, from the principal personally, if they are not sold within a reasonable time.³³⁷

In some jurisdictions, however, it is held that the factor must first proceed against the goods consigned, for the amount of his advances, before he can hold the principal personally.³³⁸ As has been said: "It is not reasonable to suppose that the parties to the agreement contemplated that the advances made in pursuance thereof should constitute a present indebtedness on the part of the consignors, for which an action might at once be maintained." The very nature of advances,—which are moneys paid by the factor to his principal on the credit of the goods consigned, and in anticipation of the debt which will become due to the principal upon the sale of such goods,—would seem to indicate that the factor should first look to such property for his reimbursement.³³⁹ But in either case

³³⁶ *Martin v. Pope*, 6 Ala. 532, 41 Am. Dec. 68.

³³⁷ *Dolan v. Thompson*, 126 Mass. 183; *Beckwith v. Sibley*, 11 Pick. (Mass.) 482; *Upham v. Lefavour*, 11 Metc. (Mass.) 174; *Stewart v. Lowe*, 24 U. C. Q. B. 434.

³³⁸ *Corlies v. Cumming*, 6 Cow. (N. Y.) 181; *Mottram v. Mills*, 2 Sandf. (N. Y.) 189; *Gihon v. Stanton*, 9 N. Y. 476; *Kraft v. Fancher*, 44 Md. 204; *Frothingham v. Everton*, 12 N. H. 239; *Balderston v. National Rubber Co.*, 18 R. I. 338, 49 Am. St. Rep. 772.

³³⁹ *Balderston v. National Rubber Co.*, 18 R. I. 338, 49 Am. St. Rep. 772. "That the law as thus stated is well founded in reason, and, indeed, well nigh indispensable to the successful prosecution of manufacturing and commercial enterprises, is evident from the results which might follow from the adoption of the 'other rule.' For, if an advance by a factor has the effect of creating a present indebtedness against the consignor, the latter is liable at any moment to be called upon to repay the amount advanced, and, failing so to do, to render his property liable to be attached, and his whole business stopped, if not destroyed, while, at the same time, the goods which have been probably produced in part by virtue of the advances are in the hands of the factor, and presumably entirely sufficient to compensate him for all his advances." By Tillingham, J., in the above case.

if the factor proceeds to sell the goods and, without any fault on his part, enough has not been realized from the sale to reimburse him, he may recover the balance from the principal.³⁴⁰

— **Del credere factor.** The factor's right to reimbursement is not affected by the fact that he is acting under a del credere commission, except that, as the nature of his commission guarantees to the principal the purchase price of the goods, where he has sold them, he cannot recover from the principal for advances to the amount of such price.³⁴¹

§ 866. Right to indemnity.

If a factor while carefully and diligently attending to the business in which he is employed by his principal, meets with any loss or incurs any liability to third persons, without any fault on his part, he has a right to be indemnified by his principal.³⁴² If, however, the factor incurs such loss in an unauthorized transaction, he cannot recover indemnity therefor from his principal, unless the latter ratifies his unauthorized acts.³⁴³

§ 867. Factor's lien—In general.

A factor has a general lien upon all goods of his principal consigned to him and in his possession, upon their proceeds, and upon securities taken for the price, for the whole amount of existing liabilities, including advances, commissions, and expenses, in good faith, incurred by him in the course of his

³⁴⁰ Blandford v. Wing Flour Mill Co., 24 Ill. App. 596; Hart v. Otis, 41 Ill. App. 431; Parker v. Brancker, 22 Pick. (Mass.) 40; Earl Fruit Co. v. Thurston Cold-Storage & Warehouse Co., 60 Minn. 351; Given v. Lemoine, 35 Mo. 110; Denney v. Wheelwright, 60 Miss. 733; Frothingham v. Everton, 12 N. H. 239; Gihon v. Stanton, 9 N. Y. 476; Strong v. Stewart, 9 Heisk. (Tenn.) 137.

³⁴¹ Graham v. Ackroyd, 10 Hare, 192.

³⁴² Johnston v. Usborne, 11 Adol. & E. 549; Beach v. Branch, 57 Ga. 362; Searing v. Butler, 69 Ill. 575; Randall v. Kehlor, 60 Me. 37; Ramsay v. Gardner, 11 Johns. (N. Y.) 439; Maxwell v. Audinwood, 15 Hun (N. Y.) 111; Rogers v. Kneeland, 10 Wend. 219; Maitland v. Martin, 86 Pa. 120; Blakely v. Frazier, 11 S. C. 122.

³⁴³ Rogers v. Kneeland, 10 Wend. (N. Y.) 219.

employment, extending to a general balance of account due from the principal to him, as factor, but not to debts outside of the agency.³⁴⁴ And he has a right to retain the proceeds

³⁴⁴ *England*: *Kruger v. Wilcox*, 1 Amb. 252; *Hudson v. Granger*, 5 Barn. & Ald. 27; *Drinkwater v. Goodwin*, Cowp. 251; *Houghton v. Matthews*, 3 Bos. & P. 485.

United States: *Peisch v. Dickson*, 1 Mason, 9, Fed. Cas. No. 10,911; *United States v. Villalonga*, 23 Wall. 35; *Matthews v. Menedger*, 2 McLean, 145, Fed. Cas. No. 9,289; *Fourth Nat. Bank of N. Y. v. American Mills Co.*, 137 U. S. 234; *Bradley v. Richardson*, 2 Blatchf. 343, Fed. Cas. No. 1,786.

Alabama: *Comer v. Way*, 107 Ala. 300, 54 Am. St. Rep. 93; *Martin v. Pope*, 6 Ala. 532, 41 Am. Dec. 66; *Schiffer v. Feagin*, 51 Ala. 335; *Sawyer v. Lorillard*, 48 Ala. 332.

Connecticut: *Weed v. Adams*, 37 Conn. 378.

Georgia: *Daniel v. Swift*, 54 Ga. 113; *Byrd v. Johnson*, 33 Ga. 113; *Brown v. Clayton*, 12 Ga. 564; *Heard v. Russell*, 59 Ga. 25.

Illinois: *Strahorn v. Union Stock Yards & Transit Co.*, 43 Ill. 424, 92 Am. Dec. 142; *Winne v. Hammond*, 37 Ill. 99; *Eaton v. Truesdell*, 52 Ill. 307; *Warren v. First Nat. Bank*, 149 Ill. 9.

Indiana: *Johnson v. Clark*, 20 Ind. App. 247; *Shaw v. Ferguson*, 78 Ind. 547.

Kentucky: *Cook's Adm'r v. Brannin*, 87 Ky. 101; *Bard v. Stewart*, 3 T. B. Mon. 72.

Louisiana: *Patterson v. McGahey*, 8 Mart. (O. S.) 486, 13 Am. Dec. 298; *Canfield v. McLaughlin*, 9 Mart. (O. S.) 303; *McNeill v. Glass*, 1 Mart. (N. S.) 261; *Kirkman v. Hamilton*, 9 Mart. (O. S.) 297.

A different rule was at one time established in this state, under the statute confining the factor's lien to specific advances made on property after it came into possession of the factor, or after he had received a bill of lading or letter of advice showing the consignment to him. *Gray v. Bledsoe*, 13 La. 489; *Collins v. Austin*, 3 La. (O. S.) 302. But the former rule was again reinstated by a later statute. *Cutters v. Baker*, 2 La. Ann. 572; *Lambeth v. Turnbull*, 5 Rob. 264, 39 Am. Dec. 536; *Quitman v. Packard*, 22 La. Ann. 70; *Howe v. Whited*, 21 La. Ann. 495; *Maxen v. Landrum*, 21 La. Ann. 366; *Phillips v. Feliciana Cotton Oil Co.*, 48 La. Ann. 404.

Maine: *McKenzie v. Nevius*, 22 Me. 138, 38 Am. Dec. 291; *Sewall v. Nichols*, 34 Me. 582; *Gragg v. Brown*, 44 Me. 157.

Maryland: *Hodgson v. Payson*, 3 Har. & J. 339, 5 Am. Dec. 439; *Ruhl v. Corner*, 63 Md. 179.

Massachusetts: *Vail v. Durant*, 7 Allen, 408, 83 Am. Dec. 636; *Johnson v. Campbell*, 120 Mass. 449; *Baker v. Fuller*, 21 Pick. 313.

Minnesota: *Haebler v. Luttgen*, 61 Minn. 315.

of the sales of such goods to meet and pay these liabilities as the several debts become due, or until he shall otherwise be relieved or discharged therefrom.³⁴⁵ This lien extends to interest on subsequent advances,³⁴⁶ and to liabilities incurred by accepting drafts on the faith of goods consigned to him,³⁴⁷ or by indorsing bills or notes for the accommodation of his principal, and the fact of his receiving a commission for such indorsement makes no difference.³⁴⁸ But if

Missouri: Archer v. McMechan, 21 Mo. 43; State v. Thompson, 120 Mo. 12; Lewis v. Mason, 94 Mo. 551; Benny v. Rhodes, 18 Mo. 147, 59 Am. Dec. 293.

Nebraska: Moline M. & S. Co. v. Walter A. Wood Mowing & Reaping Mach. Co., 49 Neb. 869.

New Hampshire: Parks v. Ingram, 22 N. H. 295, 55 Am. Dec. 153.

New York: Knapp v. Alvord, 10 Paige Ch. 205, 40 Am. Dec. 241; Holbrook v. Wight, 24 Wend. 169, 35 Am. Dec. 607; Brown v. Combs, 63 N. Y. 598; Cooper v. Hong Kong & Shanghai Banking Corp., 107 N. Y. 282; Commercial Nat. Bank v. Hellbronner, 108 N. Y. 439.

North Dakota: Rosenbaum v. Hayes, 5 N. D. 476.

Ohio: Jordan v. James, 5 Ohio, 88; Grieff v. Cowguill, 2 Disn. 58; Landis v. Gooch, 1 Disn. 176.

Pennsylvania: Harrison v. Mora, 150 Pa. 481; Watson v. Beatty, 22 Wkly. Notes Cas. 169.

South Carolina: Gage v. Allison, 1 Brev. 495, 2 Am. Dec. 682.

Tennessee: Owen v. Iglanor, 4 Cold. 15.

Vermont: Davis v. Bradley, 28 Vt. 118, 65 Am. Dec. 226.

Wisconsin: McGraft v. Rugee, 60 Wis. 406, 50 Am. Rep. 378; Chapel v. Cady, 10 Wis. 111.

If, before all the goods are delivered in pursuance of a sale by a factor, the buyers were, by a settlement with the principal, released from their contract, as to the part not delivered, by their agreement to pay a certain bonus, the factors, although never in possession of the undelivered goods, are entitled, as against an assignee of the principal, to a lien for their commissions on this bonus in the hands of the purchaser. Lafferty v. Hall, 19 Ky. L. R. 1777, 44 S. W. 426.

³⁴⁵ Vail v. Durant, 7 Allen (Mass.) 408, 83 Am. Dec. 695; and see other cases cited ante.

³⁴⁶ Heins v. Peine, 6 Rob. (N. Y.) 420.

³⁴⁷ Lambeth v. Turnbull, 5 Rob. (La.) 264, 39 Am. Dec. 536; Turpin v. Reynolds, 14 La. (O. S.) 473; Powell v. Aiken, 18 La. (O. S.) 328; Vail v. Durant, 7 Allen (Mass.) 408, 83 Am. Dec. 695; Eaton v. Truesdall, 52 Ill. 307; First Nat. Bank of Batavia v. Ege, 109 N. Y. 120, 4 Am. St. Rep. 431.

³⁴⁸ Hodgson v. Payson, 3 Har. & J. (Md.) 339, 5 Am. Dec. 439.

the property, upon faith of which drafts have been accepted by the factor, proves insufficient, he has no lien for the amount of the deficiency on subsequent consignments, to the prejudice of persons who have advanced moneys upon them, and taken transfers of bills of lading as security.³⁴⁹ So where a factor becomes surety for his principal, he has a lien on the goods, sold by him, for his principal, or their proceeds, to the amount of the sum for which he has become surety.³⁵⁰ Where a consignee, acting within the scope of his authority, employs a subagent to carry that authority into execution, as by selling goods consigned to him, or doing any other act within that authority, such subagent has a lien on the goods upon which he has made advances for the purposes of sale.³⁵¹

But where the general balance of accounts is largely against the factor and in favor of the principal, the factor can have no lien, in respect to advances, upon property in his possession, for he has no enforceable claim, and such advances will be presumed to have been made in liquidation of such balance.³⁵² In such a case the factor's right of retention and sale is merely to reimburse himself for the balance, his due on the general account of the factorage.³⁵³

"Neither can a factor who is indebted to his principal on account of previous sales acquire a particular lien upon goods subsequently sent to him for sale, for expenses incurred on account of them, unless such expenses exceed the amount of his indebtedness."³⁵⁴ Nor could the factor claim such a lien if it would be inconsistent with an agreement between the factor and his principal.³⁵⁵ Thus, where the factor receives

³⁴⁹ *First Nat. Bank of Batavia v. Ege*, 109 N. Y. 120, 4 Am. St. Rep. 431.

³⁵⁰ *Drinkwater v. Goodwin*, Cowp. 251; *Hodgson v. Payson*, 3 Har. & J. (Md.) 339, 5 Am. Dec. 430; *Stevens v. Robins*, 12 Mass. 182; *Hidden v. Waldo*, 55 N. Y. 294; *Hammonds v. Barclay*, 2 East, 227.

³⁵¹ *Bowle v. Napier*, 1 McCord (S. C.) 1, 10 Am. Dec. 641.

³⁵² *McGraft v. Rugee*, 60 Wis. 406, 50 Am. Rep. 378; *Enoch v. Wehrkamp*, 3 Bosw. (N. Y.) 398.

³⁵³ *McGraft v. Rugee*, 60 Wis. 406, 50 Am. Rep. 378.

³⁵⁴ *McGraft v. Rugee*, 60 Wis. 406, 50 Am. Rep. 378; *Enoch v. Wehrkamp*, 3 Bosw. (N. Y.) 398.

³⁵⁵ *Schiffer v. Feagin*, 51 Ala. 335; *Walker v. Birch*, 6 Term R. 258;

goods consigned to him by the owner, with notice that the consignor has drawn on him in favor of a third person, he cannot apply the proceeds of the shipment on a debt due him from the consignor on drafts drawn against other shipments, which he has paid at the consignor's request.³⁵⁶

§ 868. **Character of lien.**

A factor's lien does not depend upon any express contract, but rests upon its manifest tendency to aid the interests of trade and commerce, and to promote confidence and a liberal spirit on the part of factors in respect to advances to their principals. It is deemed to exist in all cases, until the contrary presumption is clearly established.³⁵⁷ This lien does not give the factor a right of ownership over the property, whatever the amount of advances, disbursements, or liabilities made by him. It is merely a right to retain in his possession the goods, moneys, or securities, until he has been reimbursed; or if not reimbursed within a reasonable time after demand, to sell so much as will repay him his advances and disbursements. The principal still has the right of control over the goods or the proceeds, provided he repays to the factor all advances and expenses incurred by him.³⁵⁸

— **Personal privilege** The factor's lien is a personal privilege of which the factor may avail himself, or not, as he pleases; and none but he himself can take advantage of this privilege or set it up as a defense to an action by the principal. It cannot be transferred, nor can the question upon it arise between any but the principal and factor.³⁵⁹

Frith v. Forbes, 32 Law J. Ch. 10; *Darlington v. Chamberlin*, 120 Ill. 585; *Goodhue v. McClarty*, 3 La. Ann. 447; *Gordon v. Goodrich*, 11 La. Ann. 410; *Archer v. McMechan*, 21 Mo. 43; *Moline M. & S. Co. v. Walter A. Wood Mowing & Reaping Mach. Co.*, 49 Neb. 869.

³⁵⁶ *Evans-Snyder-Buell Co. v. First Nat. Bank*, 15 Tex. Civ. App. 163.

³⁵⁷ *Martin v. Pope*, 6 Ala. 532, 41 Am. Dec. 68, citing *Story, Agency*, §§ 388, 389, and *Paley, Agency*, §§ 127, 128. And see *Nagle v. McFeeters*, 97 N. Y. 196; *Gragg v. Brown*, 44 Me. 157; *Haebler v. Lutgen*, 61 Minn. 315.

³⁵⁸ *Jordan v. James*, 5 Ohio, 88; *United States v. Villalonga*, 23 Wall. (U. S.) 35; *The Packet*, 3 Mason, 334, Fed. Cas. No. 10,655.

³⁵⁹ *Holly v. Huggefords*, 8 Pick. (Mass.) 73, 19 Am. Dec. 303, 305;

But the factor's executors or assigns may retain the property for his lien, though they cannot lawfully dispose of it.³⁶⁰

— **Priority.** A factor's lien is superior to the claims of subsequent purchasers and creditors, and it cannot be defeated by attachment, execution, or garnishment proceedings against him.³⁶¹ It is also superior to equitable claims of third persons of which the factor had no notice;³⁶² but not if he had notice of such claims at the time he made his advances.³⁶³ It

Jones v. Sinclair, 2 N. H. 321, 9 Am. Dec. 75, 76; *Daubigny v. Duval*, 5 Term R. 606; *Barnes Safe & Lock Co. v. Bloch Bros. Tobacco Co.*, 38 W. Va. 158, 45 Am. St. Rep. 846; *McComble v. Davies*, 7 East, 5; *Ames v. Palmer*, 42 Me. 197, 66 Am. Dec. 271; *Pearsons v. Tincker*, 36 Me. 384.

³⁶⁰ *Gage v. Allison*, 1 Brev. (S. C.) 495, 2 Am. Dec. 682; *Cameron v. Crouse*, 11 App. Div. (N. Y.) 391; *Terry v. Bamberger*, 44 Conn. 558; *Cook v. Kelly*, 22 N. Y. Super. Ct. 358; *In re Cabot's Estate*, 7 Phila. (Pa.) 437.

³⁶¹ *Nesmith v. Dyeing, B. & C. Co.*, 1 Curt. 130, Fed. Cas. No. 10,124; *Fourth Nat. Bank of N. Y. v. American Mills Co.*, 137 U. S. 234; *Barnett v. Warren*, 82 Ala. 557; *Beyer v. Bush*, 50 Ala. 19; *Printup v. Johnson*, 19 Ga. 73; *Daniel v. Swift*, 54 Ga. 113; *Eaton v. Truesdall*, 52 Ill. 307; *Bard v. Stewart*, 3 T. B. Mon. (Ky.) 72; *Cook's Adm'r v. Brannin*, 87 Ky. 101; *Sewall v. Nichols*, 34 Me. 582; *White Mountain Bank v. West*, 46 Me. 15; *Lewis v. Mason*, 94 Mo. 551; *Heard v. Brewer*, 4 Daly (N. Y.) 136; *Harrison v. Mora*, 150 Pa. 481.

Louisiana: *Lambeth v. Turnbull*, 5 Rob. 264, 39 Am. Dec. 536; *Maxen v. Landrum*, 21 La. Ann. 366; *Richardson v. Dinkgrave*, 26 La. Ann. 651; *Phillips v. Feliciana Cotton Oil Co.*, 48 La. Ann. 404. But see as to a general balance of account, *Gray v. Bledsoe*, 13 La. (O. S.) 489; *Smith v. McCall*, 14 La. (O. S.) 7. A factor who has advanced in expectation of a consignment, and received a bill of lading therefor, or under whose control the property has come, is preferred to an attaching creditor. *Kirkman v. Hamilton*, 9 Mart. (O. S.) 297; *Canfield v. McLaughlin*, 9 Mart. (O. S.) 303; *McNeill v. Glass*, 1 Mart. (N. S.) 261; *Park v. Porter*, 2 Rob. 342; *Levering v. Clark*, 22 La. Ann. 376.

A draft on a factor to cover the proceeds of a consignment of property to be sold on commission is not an assignment to the payee superior to the factor's lien. *Johnson v. Clark*, 20 Ind. App. 247.

³⁶² *May v. McGaughey*, 60 Ark. 357; *Hernandez v. Aaron*, 73 Miss. 434; *Archer v. McMechan*, 21 Mo. 45; *Dows v. Greene*, 24 N. Y. 638; *Hall v. Hinks*, 21 Md. 406.

³⁶³ *Cordell v. Hall*, 34 Fed. 866; *Barnett v. Warren*, 82 Ala. 557.

will not be good as against a third person who has made advances upon the bill of lading and to whom it has been transferred, of which the factor had notice at the time he made his advances or disbursements.³⁶⁴

§ 869. When lien takes effect.

(a) In general.—A factor's lien being a general lien and therefore dependent upon possession, it does not come into existence or take effect until the property on which it is claimed has lawfully and in good faith come into the actual or constructive possession of the factor.³⁶⁵ As to what kind of pos-

Branch v. Du Bose, 55 Ga. 21; Darlington v. Chamberlin, 120 Ill. 585.

³⁶⁴ National Bank of D. O. Mills & Co. v. Porter, 73 Cal. 430; Seckel v. York Nat. Bank, 57 Ill. App. 579; Fisher v. First Nat. Bank, 37 Ill. App. 333; McCausland v. Wheeler Sav. Bank, 43 Ill. App. 381; Allen v. Williams, 12 Pick. (Mass.) 297; Bank of Rochester v. Jones, 4 N. Y. 497, 55 Am. Dec. 290; First Nat. Bank of Cincinnati v. Kelly, 57 N. Y. 36; Holmes v. German Security Bank, 87 Pa. 525; Means v. Bank of Randall, 146 U. S. 620.

³⁶⁵ Kruger v. Wilcox, 1 Amb. 252; Mitchel v. Ede, 11 Adol. & El. 888; Ryberg v. Snell, 2 Wash. C. C. 403, Fed. Cas. No. 12,190; The Frances, 8 Cranch (U. S.) 418; Matthews v. Menedger, 2 McLean, 145, Fed. Cas. No. 9,289; Desha v. Pope, 6 Ala. 691, 41 Am. Dec. 76; Schiffer v. Feagin, 51 Ala. 335; Sawyer v. Lorillard, 48 Ala. 332; Byers v. Danley, 27 Ark. 77; Kollock v. Jackson, 5 Ga. 153; Warren v. First Nat. Bank, 149 Ill. 9; Strahorn v. Union Stock-Yards & Transit Co., 43 Ill. 424, 92 Am. Dec. 142; Lewis v. Galena & C. U. R. Co., 40 Ill. 281; Hodges v. Kimball, 49 Iowa, 577, 31 Am. Rep. 158; Cook's Adm'r v. Brannin, 87 Ky. 101; Campbell v. Penn, 7 La. Ann. 371; Hamilton v. Campbell, 9 La. Ann. 531; Ruhl v. Corner, 63 Md. 179; Holly v. Huggeford, 8 Pick. (Mass.) 73; Baker v. Fuller, 21 Pick. (Mass.) 318; Rice v. Austin, 17 Mass. 197; State v. Thompson, 120 Mo. 12; Valle v. Cerre's Adm'r, 36 Mo. 575, 88 Am. Dec. 161; Bruce v. Andrews, 36 Mo. 593; Moline, M. & S. Co. v. Walter A. Wood Mowing & Reaping Mach. Co., 49 Neb. 880; Brown v. Wiggins, 16 N. H. 312; Elwell v. Coon (N. J. Eq.) 46 Atl. 580; Brooks v. Bryce, 21 Wend. (N. Y.) 14; Bank of Rochester v. Jones, 4 N. Y. 497, 55 Am. Dec. 290; Winter v. Coit, 7 N. Y. 288, 57 Am. Dec. 522; Marine Bank of Chicago v. Wright, 48 N. Y. 1; Rosenbaum v. Hayes, 5 N. D. 476, 10 N. D. 311; Woodruff v. Nashville & C. R. Co., 2 Head (Tenn.) 87; Oliver v. Moore, 12 Heisk. (Tenn.) 482; Saunders v. Bartlett, 12 Heisk. (Tenn.) 316; Frost v. Deutsch (Tex.) 13 S. W. 981; Elliot v. Bradley, 23 Vt. 217.

session is sufficient to bring into effect and support this lien cannot be stated in any definite rule; whether or not the possession is sufficient in any particular case must depend upon the facts and circumstances of that case. But of course there is no doubt but that actual possession as a general rule is sufficient;³⁶⁶ and such possession by the factor is notice of his lien to creditors and purchasers.³⁶⁷ It is also well settled that the possession must have been acquired, by the factor, legally and in good faith, as possession otherwise acquired would not support this lien.³⁶⁸ The delivery of goods to a servant or an agent of a factor is equivalent to a delivery to such factor, and is sufficient possession;³⁶⁹ so the placing of goods upon drays of an agent of the factors, for the purpose of transportation to their warehouse, places the goods in the factor's possession sufficient to support a lien from that time.³⁷⁰ But a factor's lien for a general balance accrued in the lifetime of his principal does not attach to property coming into the factor's possession after the principal's death, by order of his representative.³⁷¹

(b) **Constructive possession.**—But as to what constructive possession is sufficient to give rise to and support this lien, the authorities are not in harmony. This question has arisen generally in reference to cases where goods have been consigned to a factor, to whom the consignor is indebted, and whether or not the factor has a lien on such goods while in transitu, for his advances and disbursements the cases do not fully agree. But this conflict is thought to be more apparent than real; as the different decisions are in many cases based

³⁶⁶ *Strahorn v. Union Stock-Yards & Transit Co.*, 43 Ill. 424, 92 Am. Dec. 142; *Winne v. Hammond*, 37 Ill. 99.

³⁶⁷ *Strahorn v. Union Stock-Yards & Transit Co.*, 43 Ill. 424, 92 Am. Dec. 142; *Winne v. Hammond*, 37 Ill. 99; *Rice v. Austin*, 17 Mass. 197.

³⁶⁸ *Bank of Rochester v. Jones*, 4 N. Y. 497, 55 Am. Dec. 290; *Taylor v. Robinson*, 8 Taunt. 648; *Kinloch v. Craig*, 3 Term R. 119; *McKean v. Wagenblast*, 2 Grant Cas. (Pa.) 462.

³⁶⁹ *Bonner v. Marsh*, 10 Smedes & M. (Miss.) 376, 48 Am. Dec. 754.

³⁷⁰ *Burrus v. Kyle*, 56 Ga. 24. And see *Hardeman v. De Vaughn*, 49 Ga. 596.

³⁷¹ *Wylly v. King*, Ga. Dec. (pt. 2) 7.

on an entirely different state of facts. Thus it is held that, in the absence of any special agreement, arrangement, or implied understanding otherwise, a factor has no lien for a general balance of account, until the goods come into his actual possession;³⁷² and the consignor has a right to change the destination of goods while in transitu, and the common carrier is bound to obey, although the factor had made advances on such consignment.³⁷³ In other cases, it is held that where the factor and consignor expressly or impliedly agree that the factor shall make advances upon the faith of goods to be consigned to him, and in pursuance of such agreement the factor makes the advances and the principal consigns the goods and sends to the factor the bill of lading or carrier's receipt, this symbolical delivery is sufficient possession to give the factor a lien on the goods;³⁷⁴ but in order that it may do so it is

³⁷² *Kinloch v. Craig*, 3 Term R. 119; *Nichols v. Clent*, 3 Price, 547; *Ryberg v. Snell*, 2 Wash. C. C. 403, Fed. Cas. No. 12,190; *The Frances*, 8 Cranch (U. S.) 418; *Desha v. Pope*, 6 Ala. 691, 41 Am. Dec. 76; *National Bank of D. O. Mills & Co. v. Porter*, 73 Cal. 430; *Strahorn v. Union Stock-Yards & Transit Co.*, 43 Ill. 424, 92 Am. Dec. 142; *Lewis v. Galena & C. U. R. Co.*, 40 Ill. 281; *Hodges v. Kimball*, 49 Iowa, 577, 31 Am. Rep. 158; *Ruhl v. Corner*, 63 Md. 179; *Baker v. Fuller*, 21 Pick. (Mass.) 318; *Valle v. Cerre's Adm'r*, 36 Mo. 575, 88 Am. Dec. 161, 166; *Brown v. Wiggin*, 16 N. H. 312; *Winter v. Coit*, 7 N. Y. 288, 57 Am. Dec. 522; *Bank of Rochester v. Jones*, 4 N. Y. 497, 55 Am. Dec. 290; *Saunders v. Bartlett*, 12 Heisk. (Tenn.) 316; *Woodruff v. Nashville & C. R. Co.*, 2 Head (Tenn.) 87; *Oliver v. Moore*, 12 Heisk. (Tenn.) 482.

³⁷³ *Lewis v. Galena & C. U. R. Co.*, 40 Ill. 281; *Strahorn v. Union Stock Yards & Transit Co.*, 43 Ill. 424, 92 Am. Dec. 142.

³⁷⁴ *Davis v. Bradley*, 28 Vt. 118, 65 Am. Dec. 226; *Valle v. Cerre's Adm'r*, 36 Mo. 575, 88 Am. Dec. 161; *Bank of Rochester v. Jones*, 4 N. Y. 497, 55 Am. Dec. 290; *Bonner v. Marsh*, 10 Smedes & M. (Miss.) 376, 48 Am. Dec. 754; *Haille v. Smith*, 1 Bos. & P. 563; *Lewis v. Galena & C. U. R. Co.*, 40 Ill. 281; *Prince v. Boston & L. R. Corp.*, 101 Mass. 542, 100 Am. Dec. 129.

But in *Davis v. Bradley*, 28 Vt. 118, 65 Am. Dec. 226, *Redfield, C. J.*, did not seem to think that the symbolical delivery, by delivering the receipt, was essential to the lien, basing his opinion especially on *Holbrook v. Wight*, 24 Wend. (N. Y.) 169, 35 Am. Dec. 607, in which there was a consignment of the goods but no delivery of the bill of lading. Where acceptances have actually been given upon the faith of a consignment by bill of lading, there can be no

necessary (1) that the consignment be made in terms to the factor, and (2) that as against creditors and subsequent purchasers, he must have made the advances or acceptances upon the faith of such consignment.³⁷⁵ And in such cases the goods must be actually shipped at the time the receipt is given. A mere promise to ship will not be sufficient, but it must be actually done, and the shipper's receipts, according to most of the cases, forwarded and the bill accepted, or advances made upon the faith of such shipment before any new destination is given to the cargo.³⁷⁶ A factor does not acquire any interest in goods consigned to him, from the fact

doubt that the consignee acquires such a lien or property in the goods as no subsequent act of the conveyance can divest; such an acceptance is held to be an advance upon the particular consignment. *Valle v. Cerre's Adm'r*, 36 Mo. 575, 88 Am. Dec. 161. A forwarder's receipt, stating receipt of certain goods for, or to be forwarded to, the factor, is a consignment in terms to the factor as much as if a formal bill of lading had been made in his name without the word "assigns," and in connection with advances and acceptances made upon the faith of the consignment, is sufficient to give the factor a lien upon such goods, though not actually received. *Davis v. Bradley*, 28 Vt. 118, 65 Am. Dec. 226.

In a New York case it was held that where commission merchants advanced to their principal a certain amount on his agreement to consign to them certain merchandise, they acquire an equitable lien thereon, though the principal ships part of such merchandise, through D. to another commission merchant, D.'s agent, D. having notice putting him on inquiry as to the arrangement. *Triest v. Noval*, 32 Misc. (N. Y.) 386.

³⁷⁵ *Davis v. Bradley*, 28 Vt. 118, 65 Am. Dec. 226; *Bryans v. Nix*, 4 Mees. & W. 775; *Straus v. Wessel*, 30 Ohio St. 211.

³⁷⁶ *Bryans v. Nix*, 4 Mees. & W. 775; *Davis v. Bradley*, 28 Vt. 118, 65 Am. Dec. 229; *Desha v. Pope*, 6 Ala. 690, 41 Am. Dec. 76; *Caldwell v. Wentworth*, 16 N. H. 318. As said by Goldthwaite, J., in *Desha v. Pope*, supra: "The mere agreement to ship goods in satisfaction of antecedent advances, will not, in general, give the factor or consignee a lien upon them, for his general balance, until they come to his actual possession; but if there is a specific pledge or appropriation of certain ascertained goods, accompanied with the intention that they shall be a security, or the proceeds as a payment, and they are deposited with a bailee, then the property is changed, and vests in the individual to whom they are to be delivered by the depositary."

that the consignor delivers them to a carrier addressed to the factor, and takes a receipt or bill of lading for them expressing that they are to be delivered to the factor. Until either the merchandise, or the receipt or bill, is delivered to the factor, the consignor, if he is the general owner, can sell, mortgage, or pledge them to a third person, by a transfer of the receipt or bill, notwithstanding he is indebted to the factor for advances for former consignments.³⁷⁷ In Georgia, however, it is held that a mere delivery of the goods to the common carrier, consigned to the factor in pursuance of an agreement, under which advances had been made, was sufficient possession.³⁷⁸ Delivery of the goods by the principal to a third person to hold for the factor, as such, is sufficient possession in the factor to support his lien for advances made on such goods.³⁷⁹

— **Where no specific advance is made.** Where there has been no advance or acceptance expressly made upon the particular consignment, and the question is only of a general balance of account for previous advances, the case differs not so much in principle as in the evidence required to establish the lien. Whether or not the given consignment is to be considered as made to cover a general balance of account, will depend upon the special arrangements, agreement, and understanding of the parties; but where such an agreement exists, and the consignment is made in pursuance of it, and there is nothing else in the case which is inconsistent with the hypothesis, the case would be governed by the same principle, and a delivery to the carrier will be considered as constructive

³⁷⁷ *Bank of Rochester v. Jones*, 4 N. Y. 497, 55 Am. Dec. 290.

³⁷⁸ *Elliott v. Cox*, 48 Ga. 39; *Wade v. Hamilton*, 30 Ga. 450; *Harde-
man v. De Vaughn*, 49 Ga. 596; *Clark v. Dobbins*, 52 Ga. 656; *Burrus
v. Kyle*, 56 Ga. 24. See *Nelson v. Chicago, B. & Q. R. Co.*, 2 Ill. App.
180.

³⁷⁹ *Holbrook v. Wight*, 24 Wend. (N. Y.) 169, 35 Am. Dec. 607. In this case, although there was no delivery of the bill of lading, yet the course of dealing between the parties showed an intention on the part of the consignor to vest title in the factor, by delivering the goods to a third party, consigned to the factor, which facts were known by the factor and upon faith of which he made the advancements.

delivery to the factor.³⁸⁰ In such case, the shipment and delivery of the goods to the carrier, under the bill of lading, amounts to a specific appropriation of the property with an intention that it shall be a security or a payment to the factor for the advances he has made.³⁸¹

In Louisiana it is held that, under the statutes giving a factor a privilege on property consigned to him for the payment of a debt of a consignor, a shipment to a factor, unaccompanied with any instruction as to the application of the proceeds, subjects the property to the factor's privilege from the time the bill of lading is delivered to the carrier.³⁸²

It will be seen from the above rules that the principal question to be considered in determining when the factor has sufficient possession to support his lien is one of intention. If it is manifest from the facts and circumstances in a particular case that it was the intention of the parties that the factor was to have control over the goods from any particular time, then the factor's lien would attach at that time, and his possession, although not actual, would be sufficient.

§ 870. From whom possession must be obtained.

In order that the factor's lien may be valid and effectual, it is necessary that he should have obtained possession of the goods from the true owner thereof or from one who had the right to give possession to him. The factor will have no right of lien if he obtains possession from one who has no right to give it or who has himself wrongfully obtained possession.³⁸³ But the true owner may, by his conduct, be es-

³⁸⁰ *Valle v. Cerre's Adm'r*, 36 Mo. 575, 88 Am. Dec. 161, 167; *Russell, Factors*, 203; *Clark v. Mauran*, 3 Paige (N. Y.) 373; *Desha v. Pope*, 6 Ala. 690, 41 Am. Dec. 76; *Bryans v. Nix*, 4 Mees. & W. 791; *Ryberg v. Snell*, 2 Wash. C. C. 403, Fed. Cas. No. 12,190.

³⁸¹ *Valle v. Cerre's Adm'r*, 36 Mo. 575, 88 Am. Dec. 161.

³⁸² *Ouachita Nat. Bank v. Weiss*, 49 La. Ann. 573; *Funkhouser v. Dutcher*, 14 La. Ann. 495.

³⁸³ *Ryberg v. Snell*, 2 Wash. C. C. 403, Fed. Cas. No. 12,190; *Moore v. Hill*, 38 Fed. 330; *Branch v. Du Bose*, 55 Ga. 21; *Hale v. Barrett*, 26 Ill. 195, 79 Am. Dec. 367; *Byers v. Johnson County Sav. Bank*, 64 Ill. App. 168; *Bell v. Powell*, 23 La. Ann. 796; *Barry v. Boninger*, 46 Md. 59; *Robinson v. Baker*, 5 Cush. (Mass.) 137, 51 Am. Dec. 54;

topped, as against a third person, to deny the factor's right of lien on the goods.³⁸⁴

Under the Factor's Acts, however, this rule has been changed to a certain extent. If, under such acts, the factor had, in the usual course of his business, and in good faith, received the property from one, whom he believed to be the true owner thereof, there being no fault or negligence on his part, the person in whose name the goods had been consigned shall be deemed the true owner thereof, giving the consignee a right of lien thereon for his advances. Thus the English Factor's Act provides that: "Where the owner of goods has given possession of the goods to another person for the purpose of consignment or sale, or has shipped the goods in the name of another person, and the consignee of the goods has not had notice that such person is not the owner of the goods, the consignee shall, in respect of advances made to or for the use of such person, have the same lien on the goods as if such person were the owner of the goods, and may transfer any such lien to another person."³⁸⁵ It was held under the provisions of New York Factor's Act, before repealed, that these statutes take effect only where the person shipping is the apparent owner of the goods, and where the consignees relying on this apparent ownership, have in good faith made advances on the goods.³⁸⁶

§ 871. Enforcement of lien.

A factor may sue in equity to enforce his lien upon the goods of his principal in his possession, and is entitled to judgment in such suit for any deficiency after the sale of such goods.³⁸⁷ And if his advances are not repaid within a rea-

Fitch v. Newberry, 1 Doug. (Mich.) 1, 40 Am. Dec. 33; *Archer v. McMechan*, 21 Mo. 45.

³⁸⁴ *Byers v. Johnson County Sav. Bank*, 64 Ill. App. 168; *Fowler v. Parsons*, 143 Mass. 401.

³⁸⁵ Factors' Act 1889 (52 & 53 Vict. c. 45, § 7 [1]). Similar provisions were made in the New York Factors' Act 1830, c. 179, §§ 1 and 2; but these sections have been repealed by Acts 1897, c. 148. And see Factors' Acts of other states.

³⁸⁶ *Howland v. Woodruff*, 60 N. Y. 73; *Kinsey v. Leggett*, 71 N. Y. 387; *Merchants' & T. Bank v. Farmers' & M. Nat. Bank*, 60 N. Y. 43.

³⁸⁷ *Whitman v. Horton*, 46 N. Y. Super. Ct. 531, 94 N. Y. 644; *Fourth Nat. Bank of N. Y. v. American Mills Co.*, 29 Fed. 611.

sonable time after demand, he may sell so much of the goods he has in his possession, as may be necessary to repay such advances.³⁸⁸ In some jurisdictions the factor may either proceed against the goods, or against the consignor personally for the amount of his advances; but in other jurisdictions it is held that he must proceed against the goods first, and then may go against the principal for any balance that may be due him.³⁸⁹

§ 872. Waiver or loss of lien.

As a general rule, when a factor's lien has once attached, it cannot be subsequently defeated, without the factor's consent, by any act of the principal or another.³⁹⁰ But it may be waived or lost either by an agreement between the parties, or by implication, as by the conduct of the factor.³⁹¹ Thus, the lien may be lost by the factor's voluntarily parting with the possession of the goods to which it attaches. It continues only while the factor himself has the possession, and therefore, if he pledges the goods for his own debt, or suffers them to be attached, or otherwise voluntarily parts with them or the control over them, the lien is lost;³⁹² but a mere change of the custody of the goods temporarily, the factor still having the right to control them, or if he is wrongfully deprived of them, does not amount to a waiver of his lien.³⁹³ Where

³⁸⁸ See ante, § 865.

³⁸⁹ See ante, § 865.

³⁹⁰ *Bard v. Stewart*, 3 T. B. Mon. (Ky.) 72; *Grieff v. Cowgull*, 2 Disn. (Ohio) 58; *Bowker v. Connolly*, 17 La. Ann. 12.

³⁹¹ *Heard v. Russell*, 59 Ga. 25; *Schiffer v. Feagin*, 51 Ala. 335.

³⁹² *Kruger v. Wilcox*, 1 Amb. 252; *Matthews v. Menedger*, 2 McLean, 145, Fed. Cas. No. 9,289; *Sawyer v. Lorillard*, 48 Ala. 332; *Bard v. Stewart*, 3 T. B. Mon. (Ky.) 72; *Walmsley v. Resweber*, 105 La. 522; *Holly v. Huggeford*, 8 Pick. (Mass.) 73, 19 Am. Dec. 303; *Jarvis v. Rogers*, 15 Mass. 389; *Archer v. McMechan*, 21 Mo. 43; *Pallen v. Bogy*, 78 Mo. App. 88; *Sharp v. Whipple*, 1 Bosw. (N. Y.) 557; *Rosenbaum v. Hayes*, 8 N. D. 461, 10 N. D. 311; *Barnes Safe & Lock Co. v. Bloch Bros. Tobacco Co.*, 38 W. Va. 158, 45 Am. St. Rep. 846.

³⁹³ *Winne v. Hammond*, 37 Ill. 99; *Baker v. Fuller*, 38 Mass. 318; *Matthews v. Menedger*, 2 McLean, 145, Fed. Cas. No. 9,289; *M. M. Walker Co. v. Dubuque Fruit & Produce Co.*, 106 Iowa, 245, 113 Iowa, 428.

the factor knowingly permitted the owner to take the property into his possession for several weeks, and to treat it as his own and in his own interest, and largely denude it of value, and to ship a portion of it in his own name, the law will conclusively presume that the factor's lien was lost;³⁹⁴ but if, thereafter, the remnant of the property be again placed in the hands of the factor as such, his lien will again attach.³⁹⁵

So the factor waives his lien where, when the property is demanded of him, by his principal, he claims a right to retain it on some other ground than his lien.³⁹⁶ The taking of judgment notes by the factor from his principal without relying on his right to retain the money out of the proceeds of sale of goods is held to import a waiver of his lien for advances on such goods.³⁹⁷ And where the principal tenders to the factor the amount of his advances and disbursements, the factor's lien is thereby discharged.³⁹⁸ So the factor waives or loses his lien by misconduct in transacting his principal's business;³⁹⁹ or by failing to render an account within a reasonable time or upon a reasonable demand.⁴⁰⁰

But the factor does not waive his lien by certifying in good faith, in attachment proceedings against his principal, that he holds no goods for the latter, where his advances exceed the value of such goods;⁴⁰¹ nor by pleading or offering to plead ownership, in an action of replevin against a sheriff for attaching the property on which his lien exists;⁴⁰² nor by tak-

³⁹⁴ *Rosenbaum v. Hayes*, 8 N. D. 461.

³⁹⁵ *Rosenbaum v. Hayes*, 8 N. D. 461.

³⁹⁶ *Winter v. Colt*, 7 N. Y. 238, 57 Am. Dec. 522; *McPherson v. Neuffer*, 11 Rich. Law (S. C.) 267; *Lehmann v. Schmidt*, 87 Cal. 15. See, also, *Holbrook v. Wight*, 24 Wend. (N. Y.) 169, 35 Am. Dec. 607.

³⁹⁷ *Darlington v. Chamberlain*, 20 Ill. App. 443.

³⁹⁸ *Cook v. Kelly*, 22 N. Y. Super. Ct. 358; *Miller v. Price* (Cal.) 39 Pac. 781.

³⁹⁹ *Jarvis v. Rogers*, 15 Mass. 396; *Holly v. Huggefords*, 8 Pick. (Mass.) 73, 19 Am. Dec. 303; *Jones v. Marks*, 40 Ill. 313; *Larmine v. Carley*, 114 Ill. 196.

⁴⁰⁰ *Terwilliger v. Beals*, 6 Lans. (N. Y.) 403; *Lehmann v. Schmidt*, 87 Cal. 15.

⁴⁰¹ *Bank of Mutual Redemption v. Sturgis*, 22 N. Y. Super. Ct. 660.

⁴⁰² *Rosenbaum v. Hayes*, 8 N. D. 461.

ing a note for his advances;⁴⁰³ nor by holding out his principal as the owner of the goods;⁴⁰⁴ nor by failing to assert his lien, when there is no occasion therefor;⁴⁰⁵ nor by promising to deliver the property to another, when such promise is without consideration.⁴⁰⁶

VI. LIABILITY OF FACTOR TO THIRD PERSONS.

§ 873. In general.

A factor, like other agents, may be held personally liable upon all dealings had by them with third persons without disclosing his agency; although the principal also may be held when discovered.⁴⁰⁷ Thus, if the factor sells the goods of his principal in his own name, without disclosing the principal, he would be subject to all the liabilities from such sale, the same as if he were in fact the principal.⁴⁰⁸ "Where a factor dealing for a principal, but concealing that principal, delivers goods in his own name, the person contracting with him has a right to consider him, to all intents and purposes, as the principal; and though the real principal may bring an action, yet the purchaser may set off any claim he may have against the factor."⁴⁰⁹ So a factor who sells goods with a warranty of quality, without designating himself as agent, is personally liable on the warranty, although he had settled with his principal before notice of the breach, and although the vendee was informed before action brought that the factor was not acting for himself.⁴¹⁰ But if the principal was disclosed and the factor was act-

⁴⁰³ *Story v. Flournoy*, 55 Ga. 56.

⁴⁰⁴ *Seymour v. Hoadley*, 9 Conn. 418.

⁴⁰⁵ *Hollins v. Hubbard*, 165 N. Y. 534.

⁴⁰⁶ *Hollins v. Hubbard*, 165 N. Y. 534.

⁴⁰⁷ *Davenport v. Riley*, 2 McCord (S. C.) 198. And see ante, §§ 457-464, 568.

⁴⁰⁸ *Argersinger v. Macnaughton*, 114 N. Y. 535, 11 Am. St. Rep. 687; *Sprague v. Rosenbaum*, 38 Fed. 336; *Mills v. Hunt*, 20 Wend. (N. Y.) 431; *McCullough v. Thompson*, 45 N. Y. Super. Ct. 449; *Weld v. Shaw*, 2 La. Ann. 559; *Hastings v. Lovering*, 2 Pick. (Mass.) 214, 13 Am. Dec. 420; *Thompson v. Irwin*, 42 Mo. App. 403.

⁴⁰⁹ *Rabone v. Williams*, 7 Term R. 360, note.

⁴¹⁰ *Hastings v. Lovering*, 2 Pick. (Mass.) 214, 13 Am. Dec. 420.

ing within his authority for his principal, there would be no personal liability on him as to the third party,⁴¹¹ unless he becomes so liable upon his own personal undertaking.⁴¹² So the factor would be personally liable to the third party, where he breaks his implied warranty of authority.⁴¹³ Where a factor receives for sale goods which are to be sold and the proceeds applied to a particular purpose, as to the lien of a third person, which the factor agrees to do, but after the sale refuses to pay over the amount to such third person, he would be personally liable to the latter therefor.⁴¹⁴

§ 874. When acting for foreign principal.

By the usage of trade, it was formerly considered as an established rule that factors acting for persons resident in a foreign country were personally liable upon all contracts made by them for their principals, whether their agency was fully disclosed at the time or not.⁴¹⁵ This rule arose from the consideration that, as the merchant abroad and his ability to discharge his obligations may be unknown to those who assume pecuniary responsibility, or make advances, or perform services on his account, and as there may be inconvenience in ascertaining such, the presumption in such cases was, that the credit was given exclusively to the factor, unless rebutted by an agreement, express or implied;⁴¹⁶ and that the one dealing with the factor intended to trust one who was known to him and resided in the same country and subject to the same laws as himself, rather than trust to one who, if known, could

⁴¹¹ *Mida v. Geissmann*, 17 Ill. App. 207. And see ante § 564.

⁴¹² *Lowery v. Steward*, 25 N. Y. 239, 82 Am. Dec. 346; *McCullough v. Thompson*, 45 N. Y. Super. Ct. 449; *Nixon v. Downey*, 49 Iowa, 166. See ante, § 565.

⁴¹³ Ante, § 577 et seq.

⁴¹⁴ *Peeples v. Werner*, 51 S. C. 401. Compare *Moore v. Clapp*, 36 La. Ann. 690.

⁴¹⁵ *McKenzie v. Nevius*, 22 Me. 138, 38 Am. Dec. 291; *New Castle Mfg. Co. v. Red River R. Co.*, 1 Rob. (La.) 145, 36 Am. Dec. 686; *Rogers v. March*, 33 Me. 106; *Kirkpatrick v. Stainer*, 22 Wend. (N. Y.) 244.

⁴¹⁶ *McKenzie v. Nevius*, 22 Me. 138, 38 Am. Dec. 291; *New Castle Mfg. Co. v. Red River R. Co.*, 1 Rob. (La.) 145, 36 Am. Dec. 686; *Vawter v. Baker*, 23 Ind. 63; *Story, Agency*, §§ 268, 290, 400.

not, from his residence in a foreign country, be amenable to those laws, and whose ability may be affected by local institutions and local exemptions, which may put at hazard both his rights and his remedies.⁴¹⁷ And under this rule a foreign principal is one who resides in a foreign country, and not merely in another state of the United States.⁴¹⁸

But, by the later decisions, no distinction is made between foreign and domestic factors, and the better doctrine now seems to be that it is merely a presumption that credit was given to the factor, which may be rebutted by evidence to the contrary, and that it is a question of fact as to whether personal credit was given to the factor or not.⁴¹⁹ Under the former rule, as the factor was thus exclusively looked to, he was both the person to sue and be sued.⁴²⁰ But as has been said: "The later and better opinion is that there is no such absolute presumption, and that a principal, whether foreign or domestic, may sue to recover the price of goods sold by the factor, unless it is made affirmatively to appear that exclusive credit was given to the agent by proof other than the mere fact that the principal resided in another state or country."⁴²¹

§ 875. Liability for conversion.

In this connection it has been held that in order that a factor may be held liable for conversion to a third person where he receives goods from one who is not the owner or has not the right of disposal thereof, and sells or otherwise disposes of them without the consent of such owner, a demand therefor must be made while the property or its proceeds is

⁴¹⁷ *McKenzie v. Nevius*, 22 Me. 138, 38 Am. Dec. 291; *Story, Agency*, §§ 268, 290, 400.

⁴¹⁸ *Vawter v. Baker*, 23 Ind. 63; *Kirkpatrick v. Stainer*, 22 Wend (N. Y.) 254.

⁴¹⁹ *Maury v. Ranger*, 38 La. Ann. 485, 58 Am. Rep. 197; *Bray v. Kettell*, 1 Allen (Mass.) 80; *Goldsmith v. Manheim*, 109 Mass. 187; *Kaulback v. Churchill*, 59 N. H. 296; *Oelricks v. Ford*, 23 How. (U. S.) 49; *Barry v. Page*, 10 Gray (Mass.) 398; *Vawter v. Baker*, 23 Ind. 63.

⁴²⁰ *In re Merrick's Estate*, 5 Watts & S. (Pa.) 9.

⁴²¹ *Bigelow, J.*, in *Barry v. Page*, 10 Gray (Mass.) 399. And see *Ilsley v. Merriam*, 7 Cush. (Mass.) 242, 54 Am. Dec. 721.

in his hands, or notice of the owner's title, or the want of title on the part of the party placing it in his hands, must be brought home to him, and thus fix upon him a wrongful assertion of dominion and control over another's property, and in defiance of his right.⁴²² If, under this doctrine, he has notice of the true ownership either before he sells the property or before he has turned over the proceeds to his principal, he will be liable to the true owner therefor if he sells or turns over the proceeds after such notice.⁴²³ But if, before he has obtained knowledge of the third person's ownership, he has in good faith sold the goods and paid over the proceeds to his principal, whom he believed to be the true owner, he would not be liable for conversion.⁴²⁴

But, although this doctrine may be a reasonable and just one, it is opposed to the general doctrine in reference to the liability of an agent for conversion, which is that he may be held liable therefor although he acted in good faith and believed his principal to be the true owner of the goods.⁴²⁵ And it is not apparent why a different rule should be held in the case of a factor, than in that of any other agent. A valid chattel mortgage properly recorded, though overdue and unpaid, is notice to all the world, and, though the possession of the property is in the mortgagor, the title thereto is in the mortgagee, and a factor who receives and sells the property without the knowledge or consent of the mortgagee, is liable to him for conversion;⁴²⁶ and it is immaterial, on the ques-

⁴²² *Roach v. Turk*, 9 Helsk. (Tenn.) 708, 24 Am. Rep. 360. And see *Weld v. Shaw*, 2 La. Ann. 559.

⁴²³ *Ledoux v. Anderson*, 2 La. Ann. 558; *Ledoux v. Cooper*, 2 La. Ann. 586.

⁴²⁴ *Roach v. Turk*, 9 Helsk. (Tenn.) 708, 24 Am. Rep. 360. This case expressly overrules *Taylor v. Pope*, 5 Cold. (Tenn.) 413, holding an innocent factor under like circumstances, guilty of conversion, "as unsound in principle and unsustained by authority." *Abernathy v. Wheeler*, 92 Ky. 320, 36 Am. St. Rep. 593; *Fields v. Blane*, 18 Ky. L. R. 675, 37 S. W. 850. And see *J. S. Phelps & Co. v. Barkley*, 19 Ky. L. R. 346, 40 S. W. 384.

⁴²⁵ See ante, § 600.

⁴²⁶ *Brown v. James H. Campbell Co.*, 44 Kan. 237, 21 Am. St. Rep. 274; *Merchants' & P. Bank v. Meyer*, 56 Ark. 499. Compare *Abernathy v. Wheeler*, 92 Ky. 320, 36 Am. St. Rep. 593, where it is held

tion of his liability, whether he has turned over the proceeds to the person for whom he made the sale.⁴²⁷ Thus, if he disposes of property, subject to a crop lien and a mortgage, and pays over the proceeds to his principal, he will be liable to the landlord and mortgagee for a conversion.⁴²⁸ Under the laws of Georgia, where there is a delivery of cotton by a planter or commission merchant "on cash sale" the title of the seller remains undivested until payment in full of the purchase price, and a factor into whose hands the cotton passes is chargeable with a conversion of the same if he disposes of it at the instance of the buyer, though it be sold in due course of trade, and notwithstanding the factor acts in entire good faith and without notice of retention of the title by the seller.⁴²⁹

If, however, the factor has come into possession of the property of another through the criminal acts of a third person, as from a thief, and has sold the property, received the proceeds, and paid them over to the criminal, he cannot justify his acts by claiming that he acted in good faith without negligence, supposing the criminal to be the true owner, in ignorance of the fact that he was the original wrongdoer, and that he has accounted to him. The owner of property appropriated by the criminal acts of another may follow and reclaim it wherever found and identified, and may hold any person responsible, as for a conversion, who as factor for the criminal, has assumed the right to sell it and give possession.⁴³⁰ "A sale under such circumstances is an exercise

that a mortgagee of goods cannot maintain an action for conversion against a public warehouseman who receives a portion of those goods from the apparent owner, in the usual way without any notice, either actual or constructive, of an adverse claim, and sells them on commission at a public sale in the regular course of business, without asserting any interest or right hostile to such mortgagee.

⁴²⁷ *Hughes v. Abston*, 105 Tenn. 70.

⁴²⁸ *White v. Boyd*, 124 N. C. 177; *Merchants' & P. Bank v. Meyer*, 56 Ark. 499.

⁴²⁹ *Flannery v. Harley*, 117 Ga. 483.

⁴³⁰ *Johnson v. Martin*, 87 Minn. 370, 94 Am. St. Rep. 706; *Dollif v. Robbins*, 83 Minn. 498, 85 Am. St. Rep. 466; *Miller v. Laws*, 4 Cin. Law Bul. 123.

of dominion over the property in defiance of and to the exclusion of the rights of the owner, and such exercise of dominion constitutes a conversion upon which an action may be based."⁴³¹

VII. RIGHTS OF FACTOR AS TO THIRD PERSONS.

§ 876. On contracts made in his own name.

Where a factor has entered into contracts in his own name concerning the goods which have been consigned to him, with third persons, he has a right to sue in his own name for a breach, or for the enforcement, of such contracts.⁴³²

§ 877. For goods sold.

Since a factor has a special property in goods consigned to him by reason of his lien thereon for advances, commissions, etc., he may sue in his own name for the price of such goods sold by him,⁴³³ subject, however, to the right of the principal to take the action into his own hands and sue in his own name;⁴³⁴ and subject to any defense which the defendant could have set up against the principal had the action been brought by the latter,⁴³⁵ except as to the extent of the factor's lien;⁴³⁶ and also subject to any defenses which the purchaser may have against the factor himself in the suit.⁴³⁷ If, how-

⁴³¹ *Johnson v. Martin*, 87 Minn. 370, 94 Am. St. Rep. 706.

⁴³² *Groover v. Warfield*, 50 Ga. 644; *Allen v. Steers*, 39 La. Ann. 586; *Ladd v. Arkell*, 37 N. Y. Super. Ct. 35; *Grinnell v. Schmidt*, 2 Sandf. (N. Y.) 706; *Wolfe v. Missouri Pac. R. Co.*, 97 Mo. 473, 10 Am. St. Rep. 331.

⁴³³ *Drinkwater v. Goodwin*, Cowp. 251; *Sadler v. Leigh*, 4 Camp. 195; *Graham v. Duckwall*, 8 Bush (Ky.) 12; *Miller v. Lea*, 35 Md. 396; *Ilseley v. Merriam*, 7 Cush. (Mass.) 242, 54 Am. Dec. 721; *Van Staphorst v. Pearce*, 4 Mass. 258; *Murray v. Toland*, 3 Johns. Ch. (N. Y.) 569; *Toland v. Murray*, 18 Johns. (N. Y.) 24; *Ladd v. Arkell*, 37 N. Y. Super. Ct. 35; *White v. Chouteau*, 10 Barb. (N. Y.) 202; *Girard v. Taggart*, 5 Serg. & R. (Pa.) 19, 9 Am. Dec. 327.

⁴³⁴ *Girard v. Taggart*, 5 Serg. & R. (Pa.) 19, 27, 9 Am. Dec. 327, 329; *Jackson Ins. Co. v. Partee*, 9 Heisk. (Tenn.) 296; *Walter v. Ross*, 2 Wash. C. C. 283, Fed. Cas. No. 17,122.

⁴³⁵ *Grice v. Kenrick*, L. R. 5 Q. B. 340.

⁴³⁶ *Drinkwater v. Goodwin*, Cowp. 251.

⁴³⁷ *Bauerman v. Radenius*, 7 Term R. 663; *Gibson v. Winter*, 5 Barn. & Adol. 96.

ever, the factor's lien exceeds or is equal to the value of the goods, the principal cannot control the right to sue nor defeat the factor's right to do so.⁴³⁸

Since the factor's lien extends to the proceeds of goods sold by him as well as to the goods themselves before sold, if the factor notifies the purchaser of his lien before he pays the principal, the purchaser pays the principal thereafter at his own risk, and if he pays the principal notwithstanding he has been notified, and indemnity offered, he will be liable to the factor to the extent of the latter's lien.⁴³⁹

§ 878. For torts concerning the goods.

And again, as the factor has a special property or interest in the goods consigned to him, by reason of his lien, he may maintain an action in his own name against third persons for any trespasses or other torts committed against the goods while in his possession or under his control.⁴⁴⁰ Thus he may bring an action in his own name for the conversion of the goods,⁴⁴¹ or he may maintain an action of replevin against an officer who attaches them on a writ against the owner,⁴⁴² or against an attaching creditor of the consignor, to whom the goods were delivered by the attaching officer.⁴⁴³ Or if the goods were wrongfully attached by the creditors of the consignor he may maintain an action of trespass against them.⁴⁴⁴ But as the factor's interest extends only to his advances and expenses, a creditor of his consignor may attach any surplus which the factor may have on hand after satisfying such

⁴³⁸ *Hudson v. Granger*, 5 Barn. & Ald. 27.

⁴³⁹ *Drinkwater v. Goodwin*, Cowp. 251.

⁴⁴⁰ *Bryans v. Nix*, 4 Mees. & W. 775; *Beyer v. Bush*, 50 Ala. 19; *Illinois Cent. R. Co. v. Schenk*, 64 Ill. App. 24; *Winne v. Hammond*, 37 Ill. 99; *Robinson v. Webb*, 11 Bush (Ky.) 464; *Fitzhugh v. Wiman*, 9 N. Y. 559; *Gorum v. Carey*, 1 Abb. Pr. (N. Y.) 285; *Porter v. Schendel*, 25 Misc. (N. Y.) 779.

⁴⁴¹ *Gorum v. Carey*, 1 Abb. Pr. (N. Y.) 285; *Mechanics & T. Bank v. Farmers' & M. Nat. Bank*, 60 N. Y. 40; *Ladd v. Arkell*, 37 N. Y. Super. Ct. 35.

⁴⁴² *Peters v. Elliott*, 78 Ill. 321.

⁴⁴³ *Nesmith v. Dyeing, B. & C. Co.*, 1 Curt. 130, Fed. Cas. No. 10, 124.

⁴⁴⁴ *Halliday v. Hamilton*, 11 Wall. (U. S.) 560.

interest.⁴⁴⁵ So he may maintain an action of replevin or trover against a third person for a wrongful nondelivery of the goods.⁴⁴⁶ Whether or not a factor could maintain an action in his own name against a common carrier for injuries to the goods while in its possession, depends upon whether the factor has a lien upon the goods while in transitu, or not. Thus, in some cases, it is held that a delivery of the goods to the carrier, consigned to the factor, is a sufficient delivery to the latter, and he may maintain an action against the carrier for any injury to them or for their wrongful conversion.⁴⁴⁷ On the other hand, it is held that in such cases the factor does not have a lien on the goods and cannot sue the carrier for any injury thereto while in the course of transportation.⁴⁴⁸

The factor may even maintain an action against the owner of the goods, if the latter is guilty of committing a tort against them, in such a manner as to be detrimental to the factor's lien. If the factor brings an action against the principal for a tort to the goods, he can recover only as much as his interest covers,⁴⁴⁹ whereas if a third party was the wrongdoer he can recover the full value of the goods, as is the rule in other agencies, except where such third person claims through the principal.⁴⁵⁰

⁴⁴⁵ *Patterson v. Perry*, 10 Abb. Pr. (N. Y.) 82.

⁴⁴⁶ *Holbrook v. Wright*, 24 Wend. (N. Y.) 169, 35 Am. Dec. 607; *Ladd v. Arkell*, 37 N. Y. Super. Ct. 35; *De Forest v. Fulton F. Ins. Co.*, 1 Hall (N. Y.) 84, 110.

⁴⁴⁷ *Adams v. Bissell*, 28 Barb. (N. Y.) 382; *Dows v. Greene*, 32 Barb. (N. Y.) 490; *Vose v. Allen*, 3 Blatchf. 289, Fed. Cas. No. 17,006; *Burritt v. Rensch*, 4 McLean, 325, Fed. Cas. No. 2,201; *Houston & T. C. R. Co. v. Stewart*, 1 Willson, Civ. Cas. Ct. App. § 1247; *Boston & M. C. R. Co. v. Warrior Mower Co.*, 76 Me. 261. See ante, § 869.

⁴⁴⁸ *Cobb v. Illinois Cent. R. Co.*, 88 Ill. 394; *Ogden v. Coddington*, 2 E. D. Smith (N. Y.) 317; *Woodruff v. Nashville & C. R. Co.*, 2 Head (Tenn.) 87; *Sargent v. Morris*, 3 Barn. & Ald. 277. See ante, § 869.

⁴⁴⁹ *Heard v. Brewer*, 4 Daly (N. Y.) 136.

⁴⁵⁰ *Heard v. Brewer*, 4 Daly (N. Y.) 136; *New York City v. Stone*, 20 Wend. (N. Y.) 139, 25 Wend. 157.

VIII. LIABILITY OF PRINCIPAL TO THIRD PERSONS.

§ 879. In general—Exclusive credit to factor.

The same rules that have been heretofore discussed in reference to the liability of a principal, for the acts of his agent, also apply to factors. And, as a general rule, a principal is liable to third persons for all acts done or obligations incurred by the factor while acting within the course of his employment for the principal's benefit; or if the acts were previously unauthorized, which he has subsequently ratified; and the principal cannot escape this liability by reason of private instructions which he has given to the factor, but which are not known to the third party, who deals with the factor.⁴⁵¹

If, however, the third person knew that the factor was acting for another, and expressly or impliedly gave exclusive credit to the factor, he cannot thereafter hold the principal liable for such acts of the factor.⁴⁵²

§ 880. Where principal is undisclosed.

And although the principal is not disclosed at the time the factor performs the acts, ordinarily he may be held liable when he is disclosed.⁴⁵³

IX. RIGHTS OF PRINCIPAL AS TO THIRD PERSONS.

§ 881. In general.

As a general rule a principal may sue upon all contracts entered into on his behalf by his factor, whether he was disclosed at the time of such contract or not. Although, as has been seen in a previous section, the factor may sue on contracts entered into by him for his principal, yet this right of

⁴⁵¹ *Daylight Burner Co. v. Odlin*, 51 N. H. 56, 12 Am. Rep. 45; *Dias v. Chickering*, 64 Md. 348, 54 Am. Rep. 770; *Lobdell v. Baker*, 1 Metc. (Mass.) 193, 35 Am. Dec. 358; *Higgins v. McCrea*, 116 U. S. 671; *Cobb v. Dows*, 10 N. Y. 335.

⁴⁵² *McCullough v. Thompson*, 45 N. Y. Super. Ct. 449; *James v. Bixby*, 11 Mass. 34; *French v. Price*, 24 Pick. (Mass.) 13.

⁴⁵³ As applied to other agents, see ante, § 457 et seq.; *Taintor v. Prendergast*, 3 Hill (N. Y.) 72, 38 Am. Dec. 618; *Raymond v. Crown & Eagle Mills*, 2 Metc. (Mass.) 319.

the factor is subject to the principal's right to sue thereon. The contract having been entered into for his benefit, the principal has the primary right to sue on it, although it was not known by the third party at the time of the contract that the factor was acting for another.⁴⁵⁴

§ 882. Right to follow the property.

It is a well established doctrine that so long as a factor retains in his possession the property of the principal, or its equivalent, he occupies the position of trustee, for his principal; and wherever the property of the principal can be specifically distinguished from the property of the factor, the right of the former will prevail over the possession of the latter, and the principal may follow and recover the identical articles, or their proceeds, or securities taken therefor, as long as they can be distinguished, whether in the possession of the factor, or his legal representatives, or his assignees, or whether in the possession of a third person without consideration or with notice of the trust.⁴⁵⁵ The property consigned to the

⁴⁵⁴ *Burton v. Goodspeed*, 69 Ill. 237; *Edmond v. Caldwell*, 15 Me. 340; *Miller v. Lea*, 35 Md. 396; *Barry v. Page*, 10 Gray (Mass.) 398; *Roosevelt v. Doherty*, 129 Mass. 301; *Wadsworth v. Gay*, 118 Mass. 53; *Locke v. Lewis*, 124 Mass. 1; *Merrill v. Thomas*, 7 Daly (N. Y.) 393; *Moore v. Hillabrand*, 37 Hun (N. Y.) 491; *Golden v. Levy*, 4 N. C. 141 (1 Law Rep. 527), 6 Am. Dec. 555.

⁴⁵⁵ *Taylor v. Plumer*, 3 Maule & S. 562; *Scott v. Surman*, Willes, 400; *Tooke v. Hollingsworth*, 5 Term R. 215; *Whitfield v. Brand*, 16 Mees. & W. 282; *Veil v. Mitchel*, 4 Wash. C. C. 105, Fed. Cas. No. 16,908; *Thompson v. Perkins*, 3 Mason, 232, Fed. Cas. No. 13,972; *Union Stock Yards Bank v. Gillespie*, 137 U. S. 411; *Nutter v. Wheeler*, 2 Low. 346, Fed. Cas. No. 10,384; *Romeo v. Martucci*, 72 Conn. 504, 77 Am. St. Rep. 327; *Potter v. Dennison*, 10 Ill. 590; *Clemmer v. Drivers' Nat. Bank*, 157 Ill. 206; *Fahnestock v. Bailey*, 3 Metc. (Ky.) 48, 77 Am. Dec. 161; *Bloodworth v. Jacobs*, 2 La. Ann. 24; *Kelley v. Munson*, 7 Mass. 319, 5 Am. Dec. 47; *Holly v. Huggeford*, 8 Pick. (Mass.) 73, 19 Am. Dec. 303; *Chesterfield Mfg. Co. v. Dehon*, 5 Pick. (Mass.) 7, 16 Am. Dec. 367; *St. Louis Nat. Bank v. Ross*, 9 Mo. App. 399; *Deming Co. v. Webb*, 76 Mo. App. 329; *Cady v. South Omaha Nat. Bank*, 46 Neb. 756; *National Cordage Co. v. Sims*, 44 Neb. 148; *Regier v. Craver*, 54 Neb. 507; *Martin v. Moulton*, 8 N. H. 504; *Jones v. Sinclair*, 2 N. H. 319, 9 Am. Dec. 75; *Baker v. New York Nat. Exch. Bank*, 100 N. Y. 31, 53 Am. Rep. 150; *Commercial*

factor is simply bailed, and remains in the ownership of the consignor until disposed of by the factor in pursuance of the agency established by the fact of the consignment. If the factor in violation of the consignment and out of the usual course of business transfers it to another, the consignor is entitled to retake his property,⁴⁵⁶ notwithstanding, as it has been held, it may have been transferred to an innocent purchaser for value.⁴⁵⁷ Thus, as has been seen in previous sections, the factor cannot, without the principal's consent, pledge the goods for his own debts;⁴⁵⁸ nor can he appropriate them,⁴⁵⁹ nor can they be taken in payment of such debts.⁴⁶⁰

Nat. Bank v. Hellbronner, 108 N. Y. 439; *Childs v. Waterloo Wagon Co.*, 37 App. Div. 242, 167 N. Y. 576; *Moore v. Hillabrand*, 37 Hun (N. Y.) 491; *Gindre v. Kean*, 31 Abb. N. C. (N. Y.) 100; *Price v. Ralston*, 2 Dall. (Pa.) 60, 1 Am. Dec. 260; *Sheffer v. Montgomery*, 65 Pa. 329; *Blackman v. Green*, 24 Vt. 17. A custom or usage among factors to mix in one parcel the goods of different consignors, and upon a sale of the same to charge the purchaser with the same, and in some cases to take negotiable notes therefor, and negotiate the same as their own property, and in case of the failure of the purchaser to charge the consignor with the debt as a bad debt, was held not to prevent a recovery by a consignor who could trace his goods, or the proceeds thereof, in the hands of the factor or his trustee. *Chesterfield Mfg. Co. v. Dehon*, 5 Pick. (Mass.) 7, 16 Am. Dec. 367. Under a contract of consignment of goods for sale on commission, the consignor is not estopped from setting up his title as against an innocent purchaser of the goods from the consignee, when such purchaser buys them on the same day that they are received as part of his purchase of the entire stock of goods and business of the consignee. *Romeo v. Martucci*, 72 Conn. 504, 77 Am. St. Rep. 327.

⁴⁵⁶ *Romeo v. Martucci*, 72 Conn. 504, 77 Am. St. Rep. 327; *Regier v. Craver*, 54 Neb. 507; *Childs v. Waterloo Wagon Co.*, 37 App. Div. 242, 167 N. Y. 576.

⁴⁵⁷ *Romeo v. Martucci*, 72 Conn. 504, 77 Am. St. Rep. 327.

⁴⁵⁸ See ante, §§ 837, 838.

⁴⁵⁹ See ante, § 845.

⁴⁶⁰ *Powell v. Brunner*, 86 Ga. 531; *Ellsner v. Radcliff*, 21 Ill. App. 195; *Berry v. Allen*, 59 Ill. App. 149; *W. O. Dean Co. v. Lombard*, 61 Ill. App. 94; *Blood v. Palmer*, 11 Me. 414, 26 Am. Dec. 547; *Holly v. Huggefords*, 8 Pick. (Mass.) 73, 19 Am. Dec. 303; *National Cordage Co. v. Sims*, 44 Neb. 148; *Moore v. Hillabrand*, 16 Abb. N. C. (N. Y.) 477; *Barnes Safe & Lock Co. v. Bloch Bros. Tobacco Co.*, 38 W. Va. 158, 45 Am. St. Rep. 846.

If such disposition is made of the goods, the principal may reclaim them or their proceeds. But if the proceeds of sale have been disposed of by the legal representatives or assignees of the factor in their representative character, before notice of the principal's claim, he will lose his property.⁴⁶¹ The above doctrine has frequently been applied in the cases of factors becoming bankrupt.⁴⁶² But if the bankrupt has possession of the goods under such circumstances as to make him appear to be the true owner, the principal may lose his right under this doctrine.⁴⁶³

Subject to certain exceptions, the money for which the goods are sold is considered so entirely the property of the principal, that wherever it can be traced and identified, though it has changed its form, by an investment in other goods, or even in lands, the principal shall retain it.⁴⁶⁴ If a factor sells the goods consigned to him, receives the money due upon the sales, and mixes it indiscriminately with his own cash, there cannot, from the nature of the thing, be any

⁴⁶¹ *Veil v. Mitchel*, 4 Wash. C. C. 105, Fed. Cas. No. 16,908; *Taylor v. Plumer*, 3 Maule & S. 562; *Fahnestock v. Bailey*, 3 Metc. (Ky.) 48, 77 Am. Dec. 161.

⁴⁶² *Scot v. Surman*, Willes, 400; *Tooke v. Hollingworth*, 5 Term R. 215; *Horn v. Baker*, 9 East, 215; *Bryson v. Wylie*, 1 Bos. & P. 83; *Whitfield v. Brand*, 16 Mees. & W. 282; *Thompson v. Perkins*, 3 Mason, 232, Fed. Cas. No. 13,972; *Nutter v. Wheeler*, 2 Low. 346, Fed. Cas. No. 10,384; *Veil v. Mitchel*, 4 Wash. C. C. 105, Fed. Cas. No. 16,908; *Hourquebie v. Girard*, 2 Wash. C. C. 212, Fed. Cas. No. 6,732; *London & S. F. Bank v. Parke & L. Machinery Co.*, 64 Fed. 687; *Fahnestock v. Bailey*, 3 Metc. (Ky.) 48, 77 Am. Dec. 161; *Ward v. Brandt*, 11 Mart. (O. S.; La.) 831, 13 Am. Dec. 352; *Chesterfield Mfg. Co. v. Dehon*, 5 Pick. (Mass.) 7, 16 Am. Dec. 367; *Beckwith v. Sibley*, 11 Pick. (Mass.) 482; *Merrill v. Norfolk Bank*, 19 Pick. (Mass.) 32; *Bertha Zinc & Mineral Co. v. Clute*, 7 Misc. (N. Y.) 123; *Merrill v. Thomas*, 7 Daly (N. Y.) 393; *Duguid v. Edwards*, 50 Barb. (N. Y.) 290; *Converseville Co. v. Chambersburg Woolen Co.*, 14 Hun (N. Y.) 609; *Messier v. Amery*, 1 Yeates (Pa.) 533, 1 Am. Dec. 316; *Price v. Ralston*, 2 Dall. (Pa.) 60, 1 Am. Dec. 260.

⁴⁶³ *Livesay v. Hood*, 2 Camp. 83; *Shaw v. Harvey*, 1 Adol. & E. 920.

⁴⁶⁴ *Girard v. Taggart*, 5 Serg. & R. (Pa.) 19, 9 Am. Dec. 327; *Price v. Ralston*, 2 Dall. (Pa.) 60, 1 Am. Dec. 260.

subsequent distinguishment.⁴⁶⁵ But if the factor sells on credit, and does not afterwards actually receive the money, or if, having received the money, he invests the amount in other effects for the use of the principal; or if, upon the sale, he takes notes in his own name for the price of the goods, in all these instances the property of the principal is clearly separated from the factor's, and being thus distinguished and distinguishable, it must be appropriated to the individual use of the principal.⁴⁶⁶ Where a factor deposited in a bank, to an account by itself, all drafts received by him for sales, the fact that his deposits included his commissions is not such a mixing of funds as will prevent the principal from following them.⁴⁶⁷ Persons whose goods are sold by their factors have no lien on the debt which arises from the sale in case the proceeds cannot be identified in the factor's hands.⁴⁶⁸

§ 883. For goods sold.

It has been seen in a previous section that the right of the factor to sue in his own name was subject to the right of the principal to take the matter into his own hands if he so desired;⁴⁶⁹ hence where goods have been sold by the factor on behalf of his principal, the latter may maintain an action for the purchase price thereof, although he was undisclosed at the time of the sale, and although the purchaser, in good faith, dealt with the factor as principal;⁴⁷⁰ or he may bring

⁴⁶⁵ *Price v. Ralston*, 2 Dall. (Pa.) 60, 1 Am. Dec. 260; *Scott v. Surman*, Willes, 400.

⁴⁶⁶ *Price v. Ralston*, 2 Dall. (Pa.) 60, 1 Am. Dec. 260.

⁴⁶⁷ *Richardson v. St. Louis Nat. Bank*, 10 Mo. App. 246. And where insolvent factors opened a bank account in their name, adding the word "agents" so as to protect their principal, the bank knowing of this purpose, and the factors deposited the proceeds of the principal's goods, and on settlement gave him a check to balance, it was held that the bank might not charge to that account a debt of the factors, even by their consent. *Baker v. New York Nat. Exch. Bank*, 100 N. Y. 31, 53 Am. Rep. 150.

⁴⁶⁸ *Ward v. Brandt*, 11 Mart. (O. S.; La.) 331, 13 Am. Dec. 352.

⁴⁶⁹ *Ante*, § 876.

⁴⁷⁰ *Rabone v. Williams*, 7 Term R. 360, note; *Walter v. Ross*, 2 Wash. C. C. 283, Fed. Cas. No. 17,122; *Brooks v. Doxey*, 72 Ind. 327; *Brewster v. Saul*, 8 La. (O. S.) 296; *Miller v. Lea*, 35 Md. 396.

an action in his own name for damages for breach of the contract.⁴⁷¹ This doctrine rests upon the well known common-law principle that the sale of the factor is the sale of the principal; the factor being no more than the instrument by which the principal acts, and such sale creates a contract between the owner and the purchaser.⁴⁷²

We must remember, however, that, if the factor's lien is equal to or exceeds the value of the goods, the principal does not have the right to control the action, nor can he, in such case, defeat the factor's right to sue, by bringing an action in his own name.⁴⁷³ But if the factor has not such a lien, his right is always subject to that of the principal; and although the principal was undisclosed at the time of sale, yet since the sale was made on his behalf, he may disclose himself at any time and take advantage thereof; and if it was a sale on credit, he may come in at any time before payment, and by giving notice require the purchaser to pay to him instead of to the factor.⁴⁷⁴

There are certain exceptions to this rule, however, as where the factor sells in his own name, being himself responsible for the price of the goods sold, whether collected or not, or where he sells them to his own creditor when there are mutual dealings. The principal cannot, in those cases, interfere to the prejudice of the party dealing with the factor, without any knowledge of his agency; and only the balance, if any be due to the factor, may be reclaimed by the principal.⁴⁷⁵ So it

6 Am. Rep. 417; *Ilsley v. Merriam*, 7 Cush. (Mass.) 242, 54 Am. Dec. 721; *Roosevelt v. Doherty*, 129 Mass. 301, 37 Am. Rep. 356; *Huntington v. Knox*, 7 Cush. (Mass.) 371; *Barry v. Page*, 10 Gray (Mass.) 398; *Kelley v. Munson*, 7 Mass. 319, 5 Am. Dec. 47; *Hogan v. Shorb*, 24 Wend. (N. Y.) 458; *Girard v. Taggart*, 5 Serg. & R. (Pa.) 19, 9 Am. Dec. 327; *Foster v. Smith*, 2 Cold. (Tenn.) 474, 88 Am. Dec. 604.

⁴⁷¹ *Girard v. Taggart*, 5 Serg. & R. (Pa.) 19, 27, 9 Am. Dec. 327.

⁴⁷² *Girard v. Taggart*, 5 Serg. & R. (Pa.) 19, 9 Am. Dec. 327, 329; *Kelley v. Munson*, 7 Mass. 319, 5 Am. Dec. 47, 49; *Golden v. Levy*, 4 N. C. 141 (1 Law Repos. 527), 6 Am. Dec. 555.

⁴⁷³ *Ante*, § 876 et seq.; *Hudson v. Granger*, 5 Barn. & Ald. 27.

⁴⁷⁴ *Golden v. Levy*, 4 N. C. 141 (1 Law Repos. 527), 6 Am. Dec. 555; *Kelley v. Munson*, 7 Mass. 319, 5 Am. Dec. 47; *Miller v. Lea*, 35 Md. 396, 6 Am. Rep. 417, 422.

⁴⁷⁵ *Kelley v. Munson*, 7 Mass. 319, 5 Am. Dec. 47.

would seem that where the factor has a lien on the proceeds of a sale, and he has given notice thereof to the purchaser and notified him not to pay the full amount of the purchase price to the principal, the latter can only recover the excess of the proceeds over the amount of the lien, unless the principal repays to the factor the amount of such lien.

If a factor sells the goods of several principals, or the goods of one or more principals and his own, for a gross sum, and takes a note from the purchaser in payment thereof, one principal cannot sue the purchaser for the value of his goods taken separately, although his goods were sold for a definite sum, capable of being ascertained, and which forms a distinct part of the consideration of the note. The note is payment for the whole, it is a contract which the factor had the right to make, and upon which alone the purchaser is liable. The principal is thus deprived of his direct remedy against the purchaser for the separate price of his goods.⁴⁷⁶ But a principal will not be deprived of his remedy against the purchaser by the mere fact that the factor has received a note payable in his own name, in the absence of other circumstances, as where it is given for a gross sum, or has come into the hands of a bona fide holder, or has been given in payment for the goods.⁴⁷⁷

§ 884. Defenses available to third persons.

It is a well settled rule that where a principal permits a factor to sell his goods as apparent principal, and afterwards intervenes, the purchaser who has in good faith relied upon the factor's apparent ownership is entitled to be placed in the same situation at the time of the disclosure of the real principal as if the factor had been the real contracting party, and is entitled to the same defense against the principal, as he was entitled to at that time against the factor,⁴⁷⁸ and this

⁴⁷⁶ *Roosevelt v. Doherty*, 129 Mass. 301, 37 Am. Rep. 356. Compare *Corlies v. Cumming*, 6 Cow. (N. Y.) 181; *Jackson Ins. Co. v. Partee*, 9 Heisk. (Tenn.) 296.

⁴⁷⁷ *Roosevelt v. Doherty*, 129 Mass. 301, 37 Am. Rep. 356, 360.

⁴⁷⁸ *Carr v. Hinchliff*, 4 Barn. & C. 547; *George v. Claggett*, 7 Term R. 359; *Bowmanville Mach. Co. v. Dempster*, 2 Can. Sup. Ct. Rep. 21; *Gardner v. Allen's Ex'r*, 6 Ala. 187, 41 Am. Dec. 45; *Ruan v. Gunn*,

defense or set-off need not have existed at the time of the sale. It is sufficient if it arise before notice of the real owner-

77 Ga. 53; Bullitt v. Walker, 12 La. Ann. 276; Traub v. Milliken, 57 Me. 63, 2 Am. Rep. 14; Miller v. Lea, 35 Md. 396, 6 Am. Rep. 417; Roosevelt v. Doherty, 129 Mass. 301, 37 Am. Rep. 356; Barry v. Page, 10 Gray (Mass.) 398; Huntington v. Knox, 7 Cush. (Mass.) 371; Locke v. Lewis, 124 Mass. 7; Baxter v. Sherman, 73 Minn. 434, 72 Am. St. Rep. 631; Hogan v. Shorb, 24 Wend. (N. Y.) 458; In re Merrick's Estate, 5 Watts & S. (Pa.) 9; Girard v. Taggart, 5 Serg. & R. (Pa.) 19, 9 Am. Dec. 327.

In *Baxter v. Sherman*, 73 Minn. 434, 72 Am. St. Rep. 631, Mitchell, J., says: "As applied to factors, this rule might seem at first to be inconsistent with the equally well settled doctrine, so much relied on by the plaintiffs, that a factor or commission merchant has no power to pledge his goods for his own benefit; that such an act is tortious and void as against the principal; and that, too, without regard to the pledgee's ignorance of the fact that the factor was not the real owner of the property. See *Wright v. Solomon*, 19 Cal. 64, 79 Am. Dec. 196. But both rules are equally well settled; and we apprehend that the distinguishing feature between the two is that a sale of the principal's goods in the name of the factor is within the implied actual authority of the latter, while a pledge is not. The rule referred to in the case of sale rests upon the doctrine of equitable estoppel, and is merely an application of the familiar principle that, where one of two innocent parties must suffer by the fraud of a third, the loss should fall upon him whose act or negligence enabled the third person to commit the fraud. But this rule should not be extended beyond the reason or principle upon which it is founded. It was never intended to be so used as a shield as to make every right of the real owner subordinate to the right of a third party, dealing with the factor, to gain every possible advantage of the transaction. Hence, where an agent sells in his own name for an undisclosed principal, and the principal sues the buyer for the price, the buyer cannot set off a debt due from the agent, unless, in making the purchase, he was induced by the conduct of the principal to believe, and did in fact believe, that the agent was selling on his own account." And *Mansfield, C. J.*, in *Rabone v. Williams*, 7 Term R. 360, note, said: "Where a factor, dealing for a principal, but concealing that principal, delivers goods in his own name, the person contracting with him has a right to consider him, to all intents and purposes, as the principal; and though the real principal may appear and bring an action upon that contract against the purchaser of the goods, yet that purchaser may set off any claim he may have against the factor in answer to the demand of the principal." And see *George v. Clagett*, 7 Term R. 359.

ship of the goods.⁴⁷⁹ But the mere fact that it is the custom of dealers in certain goods, at the place of sale, to settle their accounts with each other by balancing and offsetting all outstanding bills between themselves, without regard to whether such bills are due to or from them as factors or as principals, does not of itself give the buyer any right to set off a debt due him from the factor, and is, therefore, no defense to a suit brought by the principal against the buyer for the price, particularly where such custom was unknown to the plaintiff.⁴⁸⁰ So payment by the purchaser to the factor will be a good defense to the principal's action for the purchase price;⁴⁸¹ unless the latter had given notice of his interest and claim before such payment, and required him not to pay to the factor.⁴⁸²

But while the above is the general principle in such cases, yet it is incumbent upon the purchaser to act cautiously, and not be regardless of the rights of the undisclosed principal, if he has any reasonable grounds to believe that the party with whom he is dealing is but a factor. If the character of the seller is equivocal, if he is known to be in the habit of selling sometimes as principal and sometimes as factor, a purchaser who buys from him is bound to inquire in what character he acts in the particular transaction; and if the purchaser, thus knowing or having reasonable grounds to suppose that the factor is acting for an undisclosed principal, chooses to make no inquiry, he will be denied the benefit of any set-off or defense that he had against the factor, in a suit by the principal.⁴⁸³ And it is not important that the purchaser from

⁴⁷⁹ *Baxter v. Sherman*, 73 Minn. 434, 72 Am. St. Rep. 631. And see *Hogan v. Shorb*, 24 Wend. (N. Y.) 458.

⁴⁸⁰ *Baxter v. Sherman*, 73 Minn. 434, 72 Am. St. Rep. 631.

⁴⁸¹ *Golden v. Levy*, 4 N. C. 141 (1 Law Repos. 527), 6 Am. Dec. 555; *Kelley v. Munson*, 7 Mass. 319, 5 Am. Dec. 47.

⁴⁸² *Golden v. Levy*, 4 N. C. 141 (1 Law Repos. 527), 6 Am. Dec. 555; *Kelley v. Munson*, 7 Mass. 319, 5 Am. Dec. 47. Compare *Scrimshire v. Alderton*, 2 Strange, 1182.

⁴⁸³ *Dresser v. Norwood*, 17 C. B. (N. S.) 466; *Merrick v. Bernard*, 1 Wash. C. C. 479, Fed. Cas. No. 9,464; *Darlington v. Chamberlin*, 120 Ill. 585; *Miller v. Lea*, 35 Md. 396, 6 Am. Rep. 417; *Baxter v. Sherman*, 73 Minn. 434, 72 Am. St. Rep. 631; *St. Louis Nat. Bank v. Ross*, 9 Mo. App. 399; *Guy v. Oakley*, 13 Johns. (N. Y.) 332; *Ladd v. Arkell*, 40 N. Y. Super. Ct. 150.

the factor did not know who the principal was, if he knows, or is chargeable with notice, that the property belongs to a principal and not to the factor.⁴⁸⁴ But the mere fact that the purchaser knows that the one selling was a factor is not sufficient, if he does not know or have reason to believe that he was acting for another, for a factor oftentimes sells his own goods.⁴⁸⁵

A discharge under State Insolvent Laws does not bar an action by a nonresident principal for the price of goods sold by his factor residing within the state to the insolvent, though the bills were made out in the factor's name as vendor, where he informed the debtor that he was selling on commission for a citizen of another state, but did not name him.⁴⁸⁶

§ 885. For loss of or injury to property.

Inasmuch as the principal still retains the ownership of goods consigned to a factor for sale, he may maintain an action against a third person for any tort committed against the goods that tends in any way to affect his ownership therein.⁴⁸⁷ It must, however, be such a tort as tends to permanently injure the goods or affect the principal's title. A tort that merely interferes with the factor's possession, or affects his interests, would not necessarily be such a one as to give the principal a right of action. Thus, the owner of goods may maintain an action of trespass against an officer who attaches the goods as the property of the factor.⁴⁸⁸ Where a factor sells the personalty of his principal, and subsequently takes it back at a reduced figure on account of a defect, and charges the same to his principal, the latter has sufficient property therein to maintain trespass against one who takes it from the factor's possession.⁴⁸⁹

⁴⁸⁴ *Baxter v. Sherman*, 73 Minn. 434, 72 Am. St. Rep. 631.

⁴⁸⁵ *Hogan v. Shorb*, 24 Wend. (N. Y.) 458; *Graham v. Duckwall*, 8 Bush (Ky.) 12; *Schell v. Stephens*, 50 Mo. 379; *Bliss v. Bliss*, 7 Bosw. (N. Y.) 339; *Moore v. Clementson*, 2 Camp. 22.

⁴⁸⁶ *Ilsley v. Merriam*, 7 Cush. (Mass.) 242, 54 Am. Dec. 721.

⁴⁸⁷ *Holly v. Huggefard*, 8 Pick (Mass.) 73, 19 Am. Dec. 303; *Kyle v. Laurens R. Co.*, 10 Rich. Law (S. C.) 382, 70 Am. Dec. 231; *Hill v. Georgia, C. & N. R. Co.*, 43 S. C. 461.

⁴⁸⁸ *Holly v. Huggefard*, 8 Pick. (Mass.) 73, 19 Am. Dec. 303.

⁴⁸⁹ *Holly v. Huggefard*, 8 Pick. (Mass.) 73, 19 Am. Dec. 303.

CHAPTER XXII.

AUCTIONEERS, ETC.

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§ 886. Scope of chapter.

It is the purpose, in this chapter, to treat briefly on the subject of auctioneers, discussing only such portions of the subject as treat him as an agent of the vendor; avoiding all other questions, in reference to auctions or auction sales, except in so far as it may be necessary to explain the auctioneer's agency. There are other questions that may properly be discussed under the head of auctions and auctioneers, yet, as they are not questions of agency, they will not be treated here, because it is the purpose to make this work one strictly of agency.

A brief treatment of certain other classes of agents will also be given in the latter part of this chapter, such as masters of vessels, etc.

I. AUCTIONEERS.**A. Definition, Nature and Existence of the Relation.****§ 887. Definition and nature.**

An auctioneer is one whose business it is to sell property, real or personal, at public auction, to the highest bona fide bidder.¹ Various other definitions have been given, as will

¹ See *Russell v. Miner*, 61 Barb. (N. Y.) 534; *Reg. v. Rawson*, 22 Ont. 467; *Cyc. Law Dict.* p. 77; *Abbott, Law Dict.* p. 110; *Bouvier, Law Dict.* (15th Ed.) p. 208; *Black, Law Dict.* p. 105.

An auctioneer has also been defined as "a person who is authorized to sell goods or merchandise at public auction or sale for a recompense or a commission." *Story, Agency*, § 27. But it is thought that the matter of remuneration is not a necessary element of the definition, for although it is his habit to receive a commission, he may also work gratuitously, in which case he is none the less an auctioneer. *State v. Rucker*, 24 Mo. 557. So he is an auctioneer, although he sells his own property, in which case he would certainly get no pay. *Bent v. Cobb*, 9 Gray (Mass.) 397, 69 Am. Dec. 295; *City of Goshen v. Kern*, 63 Ind. 468, 30 Am. Rep. 234. In this latter case it was contended by counsel that the word "auctioneer" does not include one who sells only his own goods, but it was expressly held otherwise, the court in its decision saying: "Upon this point, the argument of counsel is founded upon one of the definitions of the word 'auctioneer,' in *Bouvier's Law Dictionary*, as follows: 'A person authorized by law to sell the goods of others

be seen from the note preceding, but the above definition is believed to give all the necessary elements in as concise language as is possible. The auctioneer must be one who makes it his business to sell, and in England and many of the states of this country, there are statutes which require that he shall be licensed and give bond. He must sell property, real or personal. It will be seen in Story's and other definitions, that they comprehend the sale of personal property only, and in that respect are faulty according to the more modern rule, as it includes real as well as personal property, and whether his own or another's. Likewise he must sell at public, not private, auction, and to the highest bona fide bidder. In some definitions the term "highest bidder" is used, but an auctioneer does not necessarily have to sell to the highest bidder, if he thinks his bid is not made

at public sale.' If the term 'auctioneer' had no other meaning than the limited one thus given it, the argument of counsel would be perhaps well founded; but Bouvier also defines an auctioneer as 'one who conducts a public sale or auction.' In Burrill's Law Dictionary, an auctioneer is defined as 'one who conducts an auction or public sale'; and again, as 'a person who is authorized to sell goods or merchandise at public auction or sale, for a recompense, or (as it is commonly called) a commission.' In Wharton's Law Dictionary, auctioneers are defined to be 'licensed agents appointed to sell property and to conduct sales or auctions.' In Webster's Dictionary, the meaning of the word 'auctioneer' is thus given: 'A person who sells by auction; a person who disposes of goods or lands by public sale to the highest bidder.' In Worcester's Dictionary the word 'auctioneer' is defined as follows: 'One whose business it is to offer property for sale by auction; one who invites bids at a sale at auction.' It will be seen by these various definitions of the word 'auctioneer' by the best lexicographers, legal and otherwise, of our language, that it, as ordinarily used, has no such limited and confined meaning as the appellee's counsel have sought to give it. Under the allegations of the appellant's complaint, the appellee was an auctioneer, within the plain, ordinary and usual sense of that term."

Mr. Bishop (Bishop, Cont. § 1131) defines an auctioneer as "one who, dealing with assembled persons competing, sells property to those who make or accept the offers most favorable to the owners." "An auctioneer is a person employed to sell at public sale, after public notice, property to the highest bidder." Wharton, Agency, § 638.

in good faith, or is made for fraudulent purposes, or that he cannot give the proper security. By the highest bona fide bidder is meant one who in good faith makes the highest bid and is able to support it. But it is not necessary that the sale be made by outcry. It is sufficient if made by any other mode of sale at public auction, whereby the highest bona fide bidder is deemed to be the purchaser. Thus, at the sale of premises, the vender invited each bidder to put down two sums on a slip of paper; and upon collecting such biddings, he whose paper contained the highest bidding was to be declared the purchaser, at the lowest of two sums if that exceeded the highest of any other bidder, and the sale was held to be an auction.²

§ 888. Who can act as auctioneer.

Generally speaking, in the absence of statutory limitations, any one who is competent to act as agent in any of the other classes of agencies, may act as an auctioneer. But there are in England and in many of the states of this country, statutes specifically prescribing who and upon what conditions one may act as an auctioneer. The usual provisions prescribed by these statutes are that he shall take out a license to so act, and shall give a bond, binding him to faithfully perform his duties.³ Other than these statutory

² *Rex v. Taylor*, McClel. 362.

³ For cases under such statutes or ordinances, see *O'Hara v. State*, 121 Ala. 28; *State v. Conkling*, 19 Cal. 501; *State v. Poulterer*, 16 Cal. 515; *Wiggins v. Chicago*, 68 Ill. 372; *City of Carrollton v. Bassette*, 159 Ill. 284; *Town of Decorah v. Dunstan*, 38 Iowa, 96; *Oskaloosa v. Tullis*, 25 Iowa, 440; *City of Iowa City v. Newell*, 115 Iowa, 55; *Fretwell v. Troy*, 18 Kan. 271; *Florance v. Richardson*, 2 La. Ann. 663; *Mouton v. Noble*, 1 La. Ann. 192; *Church Wardens of St. Louis Church v. Bonneval*, 13 La. Ann. 321; *Waterhouse v. Dorr*, 4 Me. 333; *McMechen v. Baltimore*, 3 Har. & J. (Md.) 534; *Jordan v. Smith*, 19 Pick. (Mass.) 287; *Sewall v. Jones*, 9 Pick. (Mass.) 412; *Clark v. Cushman*, 5 Mass. 505; *Gunnaldson v. Nyhus*, 27 Minn. 440; *Mankato v. Fowler*, 32 Minn. 364; *State v. Rucker*, 24 Mo. 557; *State v. Atlantic City* (N. J. Law) 50 Atl. 367; *Saul v. United States Fidelity & Guaranty Co.*, 71 App. Div. (N. Y.) 77; *People v. Grant*, 126 N. Y. 473; *People v. Scully*, 24 Misc. (N. Y.) 412; *Carpenter v. Le Count*, 93 N. Y. 562; *Village of Deposit v. Pitts*, 18 Hun (N. Y.) 475;

limitations, however, there are usually no special limitations as to who may act as an auctioneer. Thus, a stockholder and officer of a corporation may act as auctioneer in a sale for the corporation.⁴ So under such provisions, a corporation may be licensed to act as an auctioneer.⁵ Even where the statutes require him to have a license, the fact that he conducts a sale without such license does not invalidate the sale, although it subjects the auctioneer to the penalty prescribed by the statute.⁶

§ 889. Termination.

As a general rule, an auctioneer's authority ceases immediately upon the completion of the sale for which he was employed.⁷ Or it may be revoked by the vendor at any time before the goods or property are knocked down to a purchaser,⁸ and the mere fact that the auctioneer had a special property in the goods and a lien thereon for advances does not make his authority irrevocable.⁹ But where, according to the terms of sale, the auctioneer is to receive a portion of the purchase-money which is to be paid within a limited time, his authority is not terminated immediately upon the expiration of that time, without further orders from his principal prohibiting him from subsequently receiving such money.¹⁰ So the auctioneer may, for good cause, renounce his agency at any time.

Russell v. Miner, 25 Hun (N. Y.) 114; *Raleigh Com'rs v. Holloway*, 10 N. C. (3 Hawks) 234; *Crandall v. State*, 28 Ohio St. 479; *Daly v. Com.*, 75 Pa. 331; *Hunt v. Philadelphia*, 35 Pa. 277; *Davis v. Com.*, 3 Watts (Pa.) 297; *Adams v. Walker*, 100 Va. 770.

⁴ *Dupuy v. Delaware Ins. Co.*, 63 Fed. 680. See, also, *Kearney v. Taylor*, 15 How. (U. S.) 494.

⁵ *People v. Scully*, 23 Misc. (N. Y.) 732.

⁶ *Williston v. Morse*, 10 Metc. (Mass.) 17; *Learned v. Geer*, 139 Mass. 31; *Bogart v. O'Regan*, 1 E. D. Smith (N. Y.) 590.

⁷ *Seton v. Slade*, 7 Ves. 265, 276.

⁸ *Warlow v. Harrison*, 1 El. & El. 309, 29 Law J. Q. B. 14; *Manser v. Back*, 6 Hare, 443. But compare *Gunn v. Gillespie*, 2 U. C. Q. B. 151; *Morgan v. Darragh*, 39 Tex. 171.

⁹ *Taplin v. Florence*, 10 C. B. 744.

¹⁰ *Pinckney v. Hagadorn*, 1 Duer (N. Y.) 89.

*B. Agent of Whom.***§ 890. In general.**

In all cases of sales by auction, the auctioneer, acting only as such, is in some respects the agent of both parties, and his acts done in those respects will be binding on both the seller and purchaser.¹¹ But when it is said that he is the agent for both parties it must not be thought that he is the agent for both parties for the same purpose or the same thing. He "is an agent for each party in different things, but not in the same thing."¹² And it must also be remembered that this rule applies only where the auctioneer is acting in his capacity as auctioneer. If the vendor is present in person, directing and conducting the sale, and the auctioneer acts merely as a crier of the sale, he is not acting strictly as an auctioneer, and has no authority to bind either the seller or the purchaser by a memorandum.¹³

§ 891. When agent for the vendor.

Primarily an auctioneer is the agent of the seller of the property. When he is employed by the owner of property, real or personal, to sell the same at public auction, he is for the purposes of the sale the agent of such owner, and continues his agency exclusively until the bid of the highest bidder is accepted by the auctioneer and the property knocked down to him. Until this time all acts done by the auctioneer, such as advertising the property, prescribing the terms of sale, putting up the property and crying the

¹¹ *Simon v. Motivos*, 3 Burrow, 1921; *Hinde v. Whitehouse*, 7 East, 558; *Doty v. Wilder*, 15 Ill. 407, 60 Am. Dec. 756; *O'Donnell v. Leeman*, 43 Me. 158, 69 Am. Dec. 54; *White v. Dahlquist Mfg. Co.*, 179 Mass. 427; *Morton v. Dean*, 13 Metc. (Mass.) 388; *Bent v. Cobb*, 9 Gray (Mass.) 397, 69 Am. Dec. 295; *Gordon v. Saunders*, 2 McCord Ch. (S. C.) 164; *Davis v. Robertson*, 1 Mill Const. (S. C.) 71, 12 Am. Dec. 611; *Dawson v. Miller's Adm'r*, 20 Tex. 171, 70 Am. Dec. 330; *Smith v. Jones*, 7 Leigh (Va.) 165, 30 Am. Dec. 498.

¹² *Williams v. Millington*, 1 H. Bl. 85. See, also, *Coles v. Trecothick*, 9 Ves. 249; *White v. Dahlquist Mfg. Co.*, 179 Mass. 427.

¹³ *Adams v. Scales*, 1 Baxt. (Tenn.) 337, 25 Am. Rep. 772; *Buckmaster v. Harrop*, 13 Ves. 456.

sale, are done by him as the agent of the seller alone.¹⁴ As soon, however, as he lets fall the hammer and thereby accepts the purchaser's bid, he is no longer exclusively the agent of the vendor, but acts for both parties, and binds them both, by fixing and signing the memorandum of sale.¹⁵ But the auctioneer cannot bind the vendors by a memorandum signed by him some time after the sale, and after his authority has been revoked by the vendors to the knowledge of the vendee.¹⁶

§ 892. When agent for the vendee.

After the purchaser's bid has been accepted and the property knocked down to him, for the purpose of signing the latter's name to the memorandum of sale, the auctioneer is his agent alone.¹⁷ He is made the agent of the vendee by

¹⁴ *Warlow v. Harrison*, 1 El. & El. 295, 307; *Payne v. Cave*, 3 Term R. 148; *Williams v. Millington*, 1 H. Bl. 85; *Cull v. Wakefield*, 6 U. C. Q. B. (O. S.) 178; *Veazle v. Williams*, 8 How. (U. S.) 134; *Thomas v. Kerr*, 3 Bush (Ky.) 619, 96 Am. Dec. 262; *Bent v. Cobb*, 9 Gray (Mass.) 397, 69 Am. Dec. 295; *White v. Dahlquist Mfg. Co.*, 179 Mass. 427; *Proctor v. Finley*, 119 N. C. 536; *Randall v. Lautenberger*, 16 R. I. 158.

¹⁵ *Emmerson v. Heells*, 2 Taunt. 38; *White v. Proctor*, 4 Taunt. 209; *Hinde v. Whitehouse*, 7 East, 558; *Reg. v. Rawson*, 22 Ont. 467; *Veazle v. Williams*, 8 How. (U. S.) 134; *Adams v. McMillan*, 7 Port. (Ala.) 73; *Craig v. Godfroy*, 1 Cal. 415, 54 Am. Dec. 299; *O'Sullivan v. Overton*, 56 Conn. 102; *Jackens v. Nicolson*, 70 Ga. 198; *Ansley v. Green*, 82 Ga. 181; *Doty v. Wilder*, 15 Ill. 407, 60 Am. Dec. 756; *Hunt v. Gregg*, 8 Blackf. (Ind.) 105; *Thomas v. Kerr*, 3 Bush (Ky.) 619, 96 Am. Dec. 262; *Gill v. Hewett*, 7 Bush (Ky.) 10; *O'Donnell v. Leeman*, 43 Me. 158, 69 Am. Dec. 54; *Bent v. Cobb*, 9 Gray (Mass.) 397, 69 Am. Dec. 295; *White v. Dahlquist Mfg. Co.*, 179 Mass. 427; *Singstack v. Harding*, 4 Har. & J. (Md.) 186, 7 Am. Dec. 669; *Johnson v. Buck*, 35 N. J. Law, 338, 10 Am. Rep. 243; *McComb v. Wright*, 4 Johns. Ch. (N. Y.) 659; *Proctor v. Finley*, 119 N. C. 536; *Davis v. Robertson*, 1 Mill Const. (S. C.) 71, 12 Am. Dec. 611; *Meadows v. Meadows*, 3 McCord (S. C.) 458, 15 Am. Dec. 645; *Episcopal Church of Macon v. Wiley*, 2 Hill Eq. (S. C.) 584, 30 Am. Dec. 386; *Dawson v. Miller's Adm'r*, 20 Tex. 171, 70 Am. Dec. 380; *Smith v. Nelson*, 34 Tex. 516; *Walker v. Herring*, 21 Grat. (Va.) 678, 8 Am. Rep. 616; *Smith v. Jones*, 7 Leigh (Va.) 165, 30 Am. Dec. 498; *Bamber v. Savage*, 52 Wis. 110, 38 Am. Rep. 723.

¹⁶ *Schmidt v. Quinzel*, 55 N. J. Eq. 792.

¹⁷ *Williams v. Millington*, 1 H. Bl. 85; *Coles v. Trecothick*, 9 Ves.

implication by the act of the latter in giving him his bid and receiving from him without objection the announcement that the property sold is knocked down to him as purchaser.¹⁸ This rule, however, that such signing binds both parties, does not apply where the auctioneer is himself the vendor, for it does not bind the purchaser.¹⁹ "The great mischief intended to be prevented by the statute [of frauds] would still exist if one party to a contract could make a memorandum of it which could absolutely bind the other. If such were its true construction, it would be feeble security against fraud, or, rather, it would open a door for its easy commission. * * * Nor can it make any difference as to the power of the vendor to make the memorandum binding on the vendee that the sale is made by the former in his representative or fiduciary character as executor, administrator, guardian, or trustee. The chief reason in support of the rule that an auctioneer acting solely as such, may be the agent of both parties to bind them by his memorandum, is that he is supposed to be a disinterested person, having no motive to misstate the bargain, and entitled equally to the confidence of both parties. But this reason fails when he is the party to the contract, and the party in interest also."²⁰ But it has been held that the

249; *Emmerson v. Heelis*, 2 Taunt. 38; *Adams v. McMillan*, 7 Port. (Ala.) 73; *Cleaves v. Foss*, 4 Me. 1; *White v. Dahlquist Mfg. Co.*, 179 Mass. 427; *Springer v. Kleinsorge*, 83 Mo. 152; *McComb v. Wright*, 4 Johns. Ch. (N. Y.) 659; *Proctor v. Finley*, 119 N. C. 536; *Harvey v. Stevens*, 43 Vt. 653; *Walker v. Herring*, 21 Grat. (Va.) 678, 8 Am. Rep. 616.

¹⁸ *Bent v. Cobb*, 9 Gray (Mass.) 397, 69 Am. Dec. 296; *Walker v. Herring*, 21 Grat. (Va.) 678, 8 Am. Rep. 619; *Emmerson v. Heelis*, 2 Taunt. 38, 45; *Cleaves v. Foss*, 4 Me. 9; *White v. Dahlquist Mfg. Co.*, 179 Mass. 427. But the vendee may revoke his authority to sign. *Van Praagt v. Everidge* [1902] 2 Ch. 266.

¹⁹ *Bent v. Cobb*, 9 Gray (Mass.) 397, 69 Am. Dec. 295; *Wright v. Dannah*, 2 Camp. 203; *Farebrother v. Simmons*, 5 Barn. & Ald. 333; *Bird v. Boutler*, 4 Barn. & Adol. 443; *Smith v. Arnold*, 5 Mason, 417, Fed. Cas. No. 13,004; *Tull v. David*, 45 Mo. 446, 100 Am. Dec. 385; *Dunham v. Hartman*, 153 Mo. 625, 77 Am. St. Rep. 741; *Johnson v. Buck*, 35 N. J. Law, 338, 10 Am. Rep. 243.

²⁰ *Bent v. Cobb*, 9 Gray (Mass.) 397, 69 Am. Dec. 295.

reason of this disqualification does not apply to the clerk of the auctioneer. "When the bids are announced, and the property struck off, the clerk is the agent of both parties to record the sales and affix the signature of the purchasers, although he is employed to act as clerk by the auctioneer."²¹

It was formerly questioned whether an auctioneer's signing for the purchaser in the case of a sale of land was sufficient to satisfy the statute of frauds.²² But it seems now to be well settled "that the auctioneer is a competent agent to sign for the purchaser either of lands or goods at auction."²³ "There does not appear to be any good reason why the auctioneer shall be viewed as the agent of the purchaser in the sale of goods which does not equally apply to the sale of lands. The manner of conducting sales at auction must be presumed to be well known to all who resort to them in the character of bidders. Whoever bids does, in effect, authorize the auctioneer to sign his name as purchaser, if no other person bids a higher sum. The *locus poenitentiae* may be considered as continuing until this is actually done, or at least until his offer is accepted. But if the bid is not seasonably retracted, the memorandum of the auctioneer

²¹ *Johnson v. Buck*, 35 N. J. Law, 338, 10 Am. Rep. 243, 246; *Bird v. Boulter*, 4 Barn. & Adol. 443; *Durrell v. Evans*, 1 Hurl. & C. 174; *Gill v. Bicknell*, 2 Cush. (Mass.) 358; *Sims v. Landray* [1894] 2 Ch. 318, 63 Law J. Ch. 535, 70 Law T. (N. S.) 530.

²² *Stansfield v. Johnson*, 1 Esp. 101; *Buckmaster v. Harrop*, 13 Ves. 456.

²³ *White v. Proctor*, 4 Taunt. 209; *Kemeys v. Proctor*, 3 Ves. & B. Ch. 57; *Emmerson v. Heelis*, 2 Taunt. 38; *Mews v. Carr*, 1 Hurl. & N. 484; *Wood v. Midgley*, 2 Smale & G. 115; *Clarkson v. Noble*, 2 U. C. Q. B. 361; *Smith v. Arnold*, 5 Mason, 414, Fed. Cas. No. 13,004; *Adams v. McMillan*, 7 Port. (Ala.) 81; *Doty v. Wilder*, 15 Ill. 407, 60 Am. Dec. 756; *Gill v. Hewett*, 7 Bush (Ky.) 12; *O'Donnell v. Leeman*, 43 Me. 158, 69 Am. Dec. 54; *Singstack v. Harding*, 4 Har. & J. (Md.) 186, 7 Am. Dec. 669; *Davis v. Rowell*, 2 Pick. (Mass.) 264, 13 Am. Dec. 398; *Morton v. Dean*, 13 Metc. (Mass.) 385; *McComb v. Wright*, 4 Johns. Ch. (N. Y.) 659, 663; *First Baptist Church v. Bigelow*, 16 Wend. (N. Y.) 28; *Meadows v. Meadows*, 3 McCord (S. C.) 458, 15 Am. Dec. 645; *Episcopal Church of Macon v. Wiley*, 2 Hill Eq. (S. C.) 584, 30 Am. Dec. 386; *Dawson v. Miller's Adm'r*, 20 Tex. 171, 70 Am. Dec. 380; *Brent v. Green*, 6 Leigh (Va.) 16; *Smith v. Jones*, 7 Leigh (Va.) 165, 30 Am. Dec. 498.

may be considered as deliberately authorized, and this is all the statute requires."²⁴

C. Memorandum by Auctioneer—Contract of Sale.

§ 893. In general—Statute of frauds.

Notwithstanding some of the earlier cases to the contrary, it is now well settled that sales by auction, whether of real or personal property, are within the statute of frauds,²⁵ except judicial sales by order of the court.²⁶ Therefore, in order that a contract of purchase at a public auction may be enforced there must be a memorandum thereof in writing signed by the party to be charged or his agent, or some one of the other requirements of the statute must be complied with.²⁷ Until such memorandum is made and the purchaser's name signed thereto by the auctioneer or his clerk, there is a *locus poenitentiae* to the bidder, and he may withdraw his bid or otherwise refuse to complete the contract,²⁸ and such memorandum made after his withdraw-

²⁴ *Cleaves v. Foss*, 4 Me. 8.

²⁵ *Kenworthy v. Schofield*, 2 Barn. & C. 945; *Buckmaster v. Harrop*, 13 Ves. 456; *People v. White*, 6 Cal. 75; *Sanderlin v. Roman Catholic Church, R. M. Charlt.* (Ga.) 551; *Burke v. Haley*, 7 Ill. 614; *Boma v. Rowe*, 30 Ill. 198, 83 Am. Dec. 184; *Pike v. Balch*, 38 Me. 302, 61 Am. Dec. 249; *O'Donnell v. Leeman*, 43 Me. 158, 69 Am. Dec. 54; *Singstack v. Harding*, 4 Har. & J. (Md.) 186, 7 Am. Dec. 669; *Bent v. Cobb*, 9 Gray (Mass.) 397, 69 Am. Dec. 295; *Davis v. Rowell*, 2 Pick. (Mass.) 64, 13 Am. Dec. 398; *Johnson v. Buck*, 35 N. J. Law. 338, 10 Am. Rep. 246; *Davis v. Robertson*, 1 Mill Const. (S. C.) 71, 12 Am. Dec. 611; *Meadows v. Meadows*, 3 McCord (S. C.) 458, 15 Am. Dec. 645; *Brock v. Jones*, 8 Tex. 78; *Dawson v. Miller's Adm'r*, 20 Tex. 171, 70 Am. Dec. 380; *Brent v. Green*, 6 Leigh (Va.) 16.

²⁶ *Halleck v. Guy*, 9 Cal. 181, 70 Am. Dec. 643; *Watson's Adm'r v. Violet*, 2 Duv. (Ky.) 332; *Warfield v. Dorsey*, 39 Md. 299, 17 Am. Rep. 562; *Armstrong v. Vroman*, 11 Minn. 220, 88 Am. Dec. 81; *Tate v. Greenlee*, 15 N. C. (4 Dev.) 149; *Emley v. Drum*, 36 Pa. 123, 125; *Fulton v. Moore*, 25 Pa. 468; *Nichol v. Ridley*, 5 Yerg. (Tenn.) 63, 26 Am. Dec. 254. And see *Hutton v. Williams*, 35 Ala. 503, 76 Am. Dec. 297.

²⁷ *Pike v. Balch*, 38 Me. 302, 61 Am. Dec. 249; and cases cited in note 1, *supra*.

²⁸ *Gwathney v. Cason*, 74 N. C. 5, 21 Am. Rep. 484; *Dunham v. Hartman*, 153 Mo. 625, 77 Am. St. Rep. 741. Other cases hold that the

al has no binding force against him as a contract of sale.²⁹ However it may be, in the case of auction sales, not within the statute, where the bidder is bound from the fall of the hammer, yet in the case of sales of land, which are within the statute, the bidder cannot be bound until his signature is fixed to the contract of sale. This, as has been seen, may be done by the auctioneer or his clerk immediately upon the fall of the hammer; but until it, or some one of the other statutory requirements, is complied with, the bidder must have a *locus poenitentiae*. Otherwise he is bound without his signature, contrary to the statute.³⁰

These memoranda of auctioneers are the substitutes for contracts, reduced to writing, and signed by the parties.³¹

§ 894. Sufficiency of memorandum.

It is not required by the statute of frauds that the memorandum of the contract of sale shall be in any particular form.³² But it is necessary that it contain all the terms and conditions that essentially belong to the agreement. It must contain the names of vendor and vendee, the subject of the sale, the price, the terms of credit, and the conditions of sale, if any. In other words the memorandum must state the contract with reasonable certainty, so that the substance of it may be clearly understood from the writing itself without having recourse to parol evidence.³³ Thus

locus poenitentiae remains to the time of the fall of the hammer, but this is practically the same as the rule above given. See post, § 897.

²⁹ *Dunham v. Hartman*, 153 Mo. 625, 77 Am. St. Rep. 741.

³⁰ *Gwathney v. Cason*, 74 N. C. 5, 21 Am. Rep. 486; *Pike v. Balch*, 38 Me. 302, 61 Am. Dec. 248; *Cleaves v. Foss*, 4 Me. 1, 9; *McComb v. Wright*, 4 Johns. Ch. (N. Y.) 659.

³¹ *Craig v. Godfroy*, 1 Cal. 415, 54 Am. Dec. 299.

³² *Bailey v. Ogden*, 3 Johns. (N. Y.) 399, 3 Am. Dec. 509.

³³ *McLean v. Nicoll*, 7 Hurl. & N. 1024; *Fitzmaurice v. Bayley*, 9 H. L. Cas. 78; *Rishton v. Whatmore*, 8 Ch. Div. 467; *Potter v. Duffield*, L. R. 18 Eq. 4; *Dalton v. McBride*, 7 Grant's Ch. 288; *Adams v. McMillan*, 7 Port. (Ala.) 73; *Lewis v. Wells*, 50 Ala. 198; *Doty v. Wilder*, 15 Ill. 407, 60 Am. Dec. 756; *O'Donnell v. Leeman*, 43 Me. 158, 69 Am. Dec. 54; *Horton v. McCarty*, 53 Me. 394; *Gowen v. Klous*, 101 Mass. 449; *Morton v. Dean*, 13 Metc. (Mass.) 385; *Dunham v. Hartman*, 153 Mo. 625, 77 Am. St. Rep. 741; *McKeag v.*

an entry by him in the auction book, of the name of the bidder, and the amount bid, is a sufficient memorandum in writing to take the case out of the statute, whether the sale be of real or personal property.³⁴ But a memorandum of sale, which did not state certain terms of credit on notes with approved security, waiving valuation and appraisement laws, was held to be void under the statute.³⁵ So: "The tract of land to Wm. Meadows, jun., at five dollars and forty-eight cents" is an insufficient memorandum.³⁶ And where the auctioneer, after the bidding was over, asked the purchaser how he spelt his name, whereupon the latter wrote the following on a slip of paper, "H. Piednor, Jr. \$505," it was an insufficient memorandum.³⁷

It is not essential, however, that the whole bargain be contained in one memorandum. It will be sufficient, to satisfy the statute, if its terms can be gathered from two or more detached papers, if the signed memorandum contains such reference to the other papers as to make the latter part of the former. But the connection between the signed and unsigned papers cannot be made by parol evidence; it must appear by internal evidence derived from the signed memorandum.³⁸ Thus conditions of sale read

Piednor, 74 Mo. App. 593; *Johnson v. Buck*, 35 N. J. Law, 338, 10 Am. Rep. 243; *Bailey v. Ogden*, 3 Johns. (N. Y.) 399, 3 Am. Dec. 509; *Price v. Durin*, 56 Barb. (N. Y.) 647; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. (N. Y.) 273; *Coles v. Bowne*, 10 Paige (N. Y.) 526; *First Baptist Church v. Bigelow*, 16 Wend. (N. Y.) 28; *Mayer v. Adrian*, 77 N. C. 83; *Meadows v. Meadows*, 3 McCord (S. C.) 458, 15 Am. Dec. 645; *Smith v. Jones*, 7 Leigh (Va.) 165, 30 Am. Dec. 498; *Brent v. Green*, 6 Leigh (Va.) 16.

³⁴ *Singstack v. Harding*, 4 Har. & J. (Md.) 186, 7 Am. Dec. 669.

³⁵ *Norris v. Blair*, 39 Ind. 90, 10 Am. Rep. 135.

³⁶ *Meadows v. Meadows*, 3 McCord (S. C.) 458, 15 Am. Dec. 645.

³⁷ *McKeag v. Piednor*, 74 Mo. App. 593.

³⁸ *Coles v. Trecothick*, 9 Ves. 250; *Dobell v. Hutchinson*, 3 Adol. & E. 355; *Dalton v. McBride*, 7 Grant's Ch. 288; *Adams v. McMillan*, 7 Port. (Ala.) 73; *Horton v. McCarty*, 53 Me. 394; *O'Donnell v. Leeman*, 43 Me. 158, 69 Am. Dec. 54; *Gowen v. Klous*, 101 Mass. 449; *Morton v. Dean*, 13 Metc. (Mass.) 385; *Johnson v. Buck*, 35 N. J. Law, 338, 10 Am. Rep. 243, 248; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. (N. Y.) 273; *Price v. Durin*, 56 Barb. (N. Y.) 647; *Tallman v. Franklin*, 14 N. Y. 584.

before the bidding commenced, but not annexed to the catalogue on which the purchasers' names were entered, or referred to therein, cannot be used to supply the terms of sale omitted in the catalogue.³⁹

§ 895. Sufficiency of signing.

As has been seen heretofore, the auctioneer is the agent of both parties and therefore a memorandum, in writing, made and signed by the auctioneer, or his clerk under his direction is a sufficient signing to satisfy the statute of frauds;⁴⁰ and will bind the purchaser as well as the vendor.⁴¹ But as has been seen heretofore,⁴² this rule does not apply when the auctioneer is also the vendor. The agent, to make the signature, must be some third person. Neither of the contracting parties can be agent for the other. A signature by the vendor or purchaser, of the name of the other, is not a sufficient signing.⁴³ But it is not necessary that the auctioneer, or his clerk for him, sign separately each individual entry made on his book of sales; it is sufficient for him to sign at the end of the list of sales, or at some other place on the list indicating a signature of

³⁹ *Johnson v. Buck*, 35 N. J. Law, 338, 10 Am. Rep. 243, 248; *Kenworthy v. Schofield*, 2 Barn. & C. 945; *Hinde v. Whitehouse*, 7 East, 558.

⁴⁰ *Emmerson v. Heells*, 2 Taunt. 38; *Hinde v. Whitehouse*, 7 East, 558; *Adams v. McMillan*, 7 Port. (Ala.) 73; *Craig v. Godfroy*, 1 Cal. 415, 54 Am. Dec. 299; *Doty v. Wilder*, 15 Ill. 407, 60 Am. Dec. 756; *Hart v. Woods*, 7 Blackf. (Ind.) 568; *Thomas v. Kerr*, 3 Bush (Ky.) 619, 96 Am. Dec. 262; *O'Donnell v. Leeman*, 43 Me. 158, 69 Am. Dec. 54; *Pike v. Balch*, 38 Me. 302, 61 Am. Dec. 248; *Bent v. Cobb*, 9 Gray (Mass.) 397, 69 Am. Dec. 295; *Morton v. Dean*, 13 Metc. (Mass.) 385; *McComb v. Wright*, 4 Johns. Ch. (N. Y.) 659; *First Baptist Church v. Bigelow*, 16 Wend. (N. Y.) 28; *Pugh v. Chesseldine*, 11 Ohio, 109, 37 Am. Dec. 414; *Episcopal Church of Macon v. Wiley*, 2 Hill Eq. (S. C.) 584, 30 Am. Dec. 386; *Gordon v. Saunders*, 2 McCord Ch. (S. C.) 164; *Harvey v. Stevens*, 43 Vt. 655; *Smith v. Jones*, 7 Leigh (Va.) 165, 30 Am. Dec. 498; *Brent v. Green*, 6 Leigh (Va.) 16.

⁴¹ Ante, § 890 et seq.

⁴² Ante, § 892.

⁴³ *Johnson v. Buck*, 35 N. J. Law, 338, 10 Am. Rep. 243, 246; *Wright v. Dannah*, 2 Camp. 203; *Sharman v. Brandt*, L. R. 6 Q. B. 720; *Bent v. Cobb*, 9 Gray (Mass.) 397, 69 Am. Dec. 295.

the whole, for each day, where the sale continues more than one day.⁴⁴ The signing by the auctioneer of the name of the highest bidder on the side of the printed advertisement, with an entry of the price bid, is a sufficient signing of the contract to bind the bidder.⁴⁵

The clerk of the auctioneer has the same authority as his master, and an entry by him under the direction of the auctioneer is sufficient.⁴⁶ "In all extensive auction sales, a clerk is indispensably necessary, and the employment of one is safest for both vendor and vendee. Great inconvenience would be experienced, and much mischief done, if we were to decide that a memorandum signed by the auctioneer's clerk was not as complete a compliance with the statute as the signature by the auctioneer himself."⁴⁷ Thus, the signature of the purchaser to the conditions of sale, made by the auctioneer's clerk, as the bids are publicly announced, is a sufficient signing within the statute of frauds.⁴⁸ But an agent of the owner of land, engaging an auctioneer to make sale thereof cannot, as the latter's clerk, make an entry of the sale, so as to bind the bidder to whom the property is finally knocked off by the auctioneer.⁴⁹ Such a memorandum does not satisfy the statute of frauds.⁵⁰ So an entry made by the vendor in his book of sales, of the name

⁴⁴ *Price v. Durin*, 56 Barb. (N. Y.) 647.

⁴⁵ *Proctor v. Finley*, 119 N. C. 536.

⁴⁶ *Bird v. Boulter*, 4 Barn. & Adol. 443; *Clarkson v. Noble*, 2 U. C. Q. B. 361; *Adams v. McMillan*, 7 Port. (Ala.) 73; *Doty v. Wilder*, 15 Ill. 407, 60 Am. Dec. 756; *Hart v. Woods*, 7 Blackf. (Ind.) 568; *Norris v. Blair*, 39 Ind. 90, 10 Am. Rep. 135; *Alna v. Plummer*, 4 Me. 258; *Johnson v. Buck*, 35 N. J. Law, 338, 10 Am. Rep. 243; *Frost v. Hill*, 3 Wend. (N. Y.) 386; *First Baptist Church v. Bigelow*, 16 Wend. (N. Y.) 28; *Cherry v. Long*, 61 N. C. (Phil.) 466; *Harvey v. Stevens*, 43 Vt. 653; *Smith v. Jones*, 7 Leigh (Va.) 165, 30 Am. Dec. 498. But see *Meadows v. Meadows*, 3 McCord (S. C.) 458, 15 Am. Dec. 645; *Carmack v. Masterson*, 3 Stew. & P. (Ala.) 411.

⁴⁷ *Brockenbrough, J.*, in *Smith v. Jones*, 7 Leigh (Va.) 165, 30 Am. Dec. 498.

⁴⁸ *Johnson v. Buck*, 35 N. J. Law, 338, 10 Am. Rep. 243; *Bird v. Boulter*, 4 Barn. & Adol. 443; *Harvey v. Stevens*, 43 Vt. 653.

⁴⁹ *Howell v. Shewell*, 96 Ga. 454, 51 Am. St. Rep. 148; *Bamber v. Savage*, 52 Wis. 110, 38 Am. Rep. 723.

⁵⁰ *Howell v. Shewell*, 96 Ga. 454, 51 Am. St. Rep. 148.

of the buyer and the terms of the contract of sale, which was read to the agent of the vendee, making the purchase, and assented to by him, was held an insufficient memorandum, it not being signed by the party to be charged or his agent.⁵¹

§ 896. Time of making and signing memorandum.

But in order to make such a signing as will bind the purchaser, and satisfy the statute, the insertion of the name of the purchaser in the memorandum of sale must be made by the auctioneer or his clerk, immediately, or as soon as practicable, after receiving his bid, and striking down the hammer. The auctioneer cannot wait until after the sale is over, and at a different place; but it must be done by him or by his clerk under his direction at the time and place of the sale.⁵² It is not sufficient for the auctioneer to enter, in the absence of the purchaser, the sale on his book at his office upon his return from the place of sale, he having no sufficient memorandum of the sale, made at the time, from which to make the entry.⁵³ The statute does not say "that the memorandum in writing shall be contemporaneous with the sale. But the courts, upon principles of just policy, have bound up the words by this restriction, in order to prevent men from being ensnared by contracts subsequently reduced to writing by agents."⁵⁴ The auctioneer is the agent of each party at the time of the sale, but not afterwards.⁵⁵

As has been said: "The principle of all the cases is, that the auctioneer at the sale is the agent; that the pur-

⁵¹ *Bailey v. Ogden*, 3 Johns. (N. Y.) 399, 3 Am. Dec. 509.

⁵² *McComb v. Wright*, 4 Johns. Ch. (N. Y.) 659, 663; *Craig v. Godfroy*, 1 Cal. 415, 54 Am. Dec. 299; *Hicks v. Whitmore*, 12 Wend. (N. Y.) 548; *Smith v. Arnold*, 5 Mason, 414, Fed. Cas. No. 13,004; *Gill v. Bicknell*, 2 Cush. (Mass.) 355, 358; *Horton v. McCarty*, 53 Me. 394; *Schmidt v. Quinzel*, 55 N. J. Eq. 792. Compare *White v. Dahlquist Mfg. Co.*, 179 Mass. 427, where the signing of the memorandum by the auctioneer on the day after the sale was held good, for the purpose of satisfying the statute of frauds.

⁵³ *Horton v. McCarty*, 53 Me. 394.

⁵⁴ *Story, J.*, in *Smith v. Arnold*, 5 Mason, 419, Fed. Cas. No. 13,004.

⁵⁵ *Craig v. Godfroy*, 1 Cal. 415, 54 Am. Dec. 299.

chaser by the act of bidding, calls on him or his clerk to put down his name as the purchaser. The entry, being made in his presence, is presumed to be made with his sanction, and to indicate his approval of the terms thus written down. In such cases there is but little danger of mistake or fraud. But if a third person, not present, or even the auctioneer, may afterward add the name of another purchaser, he may strike out the name already inserted, and substitute that of a new and different purchaser. He may defeat rights already vested. He may impose liabilities never contracted. The party to be charged may thus be held liable by a writing he never saw, signed by an agent of whom he never heard. For, as the memorandum in these cases is the only evidence of the contract, no parol testimony can be received to show that the terms had not been truly and correctly stated. The rule applicable to auctioneers' sales was not established without strong opposition from able jurists. Every principle of justice and sound policy requires that the limitation thrown around them should be rigidly adhered to by the courts.⁵⁶

Thus an entry in the sale book of an auctioneer in the afternoon of the same day the sale occurred does not comply with the requirements of that section of the statute of frauds which requires the entry to be made at the time of the sale.⁵⁷ But the entry in the book of sales need not be made right at the time of sale, if it is entered as soon as practicable thereafter, from a pencil memorandum on a loose slip of paper, made at the moment of the sale. Such an entry will be regarded as the original entry.⁵⁸ In a New York case, however, it has been held under the New York statute that it is not enough that a minute in pencil be made at the place of sale of the sums bid and the name of the highest bidder, although an entry be immediately thereafter made in a sale book, setting forth all the particulars prescribed by statute, if such entry be made at a place different from that where the sale was had.⁵⁹

⁵⁶ Walker v. Herring, 21 Grat. (Va.) 678, 8 Am. Rep. 616.

⁵⁷ Craig v. Godfroy, 1 Cal. 415, 54 Am. Dec. 299.

⁵⁸ Episcopal Church v. Willey, 2 Hill Eq. (S. C.) 584, 30 Am. Dec. 386.

⁵⁹ Hicks v. Whitmore, 12 Wend. (N. Y.) 548.

§ 897. Completion of sale—Withdrawal of property or bid.

When property is put up at public auction, it presents an offer for the making of a contract, which becomes complete when a proper counter-offer or bid made by the other party is accepted by the auctioneer, and the property knocked down to such bidder. If the offer of sale is unaccompanied by any special terms or conditions the sale is complete and title to the property passes to the purchaser immediately upon the fall of the hammer,⁶⁰ though he is not entitled to the possession of such property until he has paid or tendered the amount of his bid.⁶¹ Where, however, the offer of sale is accompanied by certain terms or conditions, such sale does not become complete until those terms or conditions have been complied with,⁶² although there has been a tender of money in satisfaction of the amount bid,⁶³ unless they have been waived.⁶⁴ But until the property is knocked off to him a bidder acquires no right to compel a conveyance thereof to him.⁶⁵

Like all other cases of offer and acceptance, as a general rule, a locus poenitentiae remains to either party until the contract is completed. Although the bidder has already placed his bid on the property, he may withdraw it at any time, until it is accepted and the property knocked down to him.⁶⁶ Likewise the owner of the property may withdraw

⁶⁰ *Coker v. Dawkins*, 20 Fla. 141; *Lucas v. Wallace*, 42 Ill. App. 172; *Clark v. Greeley*, 62 N. H. 394; *Jenness v. Wendell*, 51 N. H. 63, 12 Am. Rep. 48; *Noah v. Pierce*, 85 Mich. 70; *Proctor v. Finley*, 119 N. C. 536. Compare *Pike v. Balch*, 38 Me. 302, 61 Am. Dec. 248.

⁶¹ *Wakefield v. Gorrie*, 5 U. C. Q. B. 159; *Jennings v. West*, 40 Kan. 372; *Mazoue v. Caze*, 18 La. Ann. 31; *Wainscott v. Smith*, 68 Ind. 312.

⁶² *Williams v. Connaway*, 3 Houst. (Del.) 63; *Morgan v. East*, 126 Ind. 42; *Matthews v. McElroy*, 79 Mo. 202; *Clark v. Greeley*, 62 N. H. 394.

⁶³ *Morgan v. East*, 126 Ind. 42.

⁶⁴ *Burt v. Kennedy*, 3 Penny. (Pa.) 238; *Mitchell v. Zimmerman*, 109 Pa. 183, 58 Am. Rep. 715; *Sweeney v. Vaughn*, 94 Tenn. 534.

⁶⁵ *Tillman v. Dunman*, 114 Ga. 406, 88 Am. St. Rep. 28.

⁶⁶ *Payne v. Cave*, 3 Term R. 148; *Warlow v. Harrison*, 1 El. & El. 295, 29 Law J. Q. B. 14; *Cull v. Wakefield*, 6 U. C. Q. B. (O. S.) 178; *Blossom v. Milwaukee & C. R. Co.*, 3 Wall. (U. S.) 196; *Hibernia Sav.*

it at any time before the fall of the hammer, even though the sale was advertised to be without reserve;⁶⁷ but in such a case, as the auctioneer is liable to the highest bidder, and as the vendor must indemnify him, he withdraws his property at his own risk.⁶⁸ And this right of the vendor exists, although such withdrawal is the result of collusion between himself and another.⁶⁹ An officer offering property at a judicial sale may withdraw it before it is knocked off, except when his discretion is controlled by the order of sale.⁷⁰ So an executor may withdraw property offered for sale at public outcry after bids are received and cried, but before it is knocked off to the highest bidder.⁷¹

D. Powers of Auctioneer.

§ 898. How conferred.

As has been seen, the relation existing between seller and auctioneer is that of principal and agent; hence, any authority possessed by the auctioneer, as such, is derivative only, and is conferred upon him by his principal, as in all other agencies, either by deed, by writing not under seal, by parol, or by implication.⁷² But it need not assume any particular form, nor is it necessary that it be in writing; and although it is an authority to sell real estate, parol authority will be sufficient.⁷³ So his authority may be implied

& Loan Soc. v. Behnke, 121 Cal. 339; Tillman v. Dunman, 114 Ga. 406, 88 Am. St. Rep. 28; Grotenkemper v. Achtermeyer, 11 Bush (Ky.) 222; Fisher v. Seltzer, 23 Pa. 308, 62 Am. Dec. 335; Hartwell v. Gurney, 16 R. I. 78.

⁶⁷ Warlow v. Harrison, 1 El. & El. 295, 29 Law J. Q. B. 14; Cull v. Wakefield, 6 U. C. Q. B. (O. S.) 178; Tillman v. Dunman, 114 Ga. 406, 88 Am. St. Rep. 28; Corryolles v. Mossy, 2 La. (O. S.) 504; Baham v. Bach, 13 La. 287, 33 Am. Dec. 561; Hartwell v. Gurney, 16 R. I. 78.

⁶⁸ Warlow v. Harrison, 29 Law J. Q. B. 14.

⁶⁹ Tillman v. Dunman, 114 Ga. 406, 88 Am. St. Rep. 28.

⁷⁰ Tillman v. Dunman, 114 Ga. 406, 88 Am. St. Rep. 28.

⁷¹ Tillman v. Dunman, 114 Ga. 406, 88 Am. St. Rep. 28.

⁷² Pike v. Wilson, 1 Jur. (N. S.) 59; Cronan v. McDonogh's Succession, 12 La. Ann. 269; Florance v. Richardson, 2 La. Ann. 663.

⁷³ Doty v. Wilder, 15 Ill. 407, 60 Am. Dec. 756; Yourt v. Hopkins, 24 Ill. 329.

from the principal's conduct. Thus, where the latter sends goods to an auction room, he will be deemed to have thereby impliedly authorized the auctioneer to sell them at auction unless there is something showing the contrary, and a bona fide purchaser at such sale will be protected.⁷⁴ But an agent authorized to sell property is not impliedly authorized to sell it at auction, where he is clothed with the usual power to sell; and a purchaser at such a sale, with notice of agent's powers, or where the circumstances were such as to put him upon inquiry, who fails to make inquiries, takes no title.⁷⁵

— **Ratification.** An auctioneer's acts may also be made binding on the principal by his ratification thereof, although they were previously unauthorized. Thus, where one sells the lands of another at public auction, assuming to act as his agent, and receives a portion of the purchase money, which he returns to the purchaser because of an alleged defect in the title, after the owner has tendered a deed to the purchaser, and has notified the agent in writing not to return the money, the acts of the owner are such a ratification of the agent's acts as will entitle the former, upon showing a good record title, to recover of the latter the purchase money returned, as money received and had to the use and benefit of the former.⁷⁶

§ 899. Implied powers—To prescribe terms of sale and rules of bidding.

Primarily, the owner of property offered for sale at auction has the right to prescribe the manner, conditions, and terms of sale; and where these are reasonable and made known to the buyer, they are binding upon him, and he cannot acquire a title in opposition to them and against the consent of the owner.⁷⁷ And an auctioneer, being a special agent, has only certain powers, with notice of which the

⁷⁴ *Morgan v. Darragh*, 39 Tex. 171; *Pickering v. Busk*, 15 East, 38.

⁷⁵ *Towle v. Leavitt*, 23 N. H. 360, 55 Am. Dec. 195.

⁷⁶ *Montgomery v. Pacific Coast Land Bureau*, 94 Cal. 284, 28 Am. St. Rep. 122.

⁷⁷ *Farr v. John*, 23 Iowa, 286, 92 Am. Dec. 426; *Poree v. Bonneval*, 6 La. Ann. 386; *Layton v. Hennen*, 3 La. Ann. 1.

purchaser is charged, and he cannot get a good title if the auctioneer exceeds the terms prescribed by the owner.⁷⁸ Thus, the owner of property being sold at auction may cause the auctioneer to publicly announce that no bids less than five cents will be received; and after such notice a person who bids only one cent in advance of a previous bid, although the previous one was a bid left by an absentee, acquires no title to the article upon which he bid.⁷⁹ So it is competent for the vendor to fix a minimum price below which the property shall not be sold;⁸⁰ or to reserve to himself the right to bid,⁸¹ or to employ another to bid for him;⁸² but he must give fair notice of the fact, so that no one will be misled or deceived in the sale.⁸³ The advertisements of the sale are no part of the conditions of sale unless expressly made so.⁸⁴

But where the owner has not exercised his right to prescribe such terms and conditions, he impliedly authorizes the auctioneer to do so, and the latter has much latitude and discretion in prescribing such terms as are usual in like cases, or as will exclude puffers and fraudulent bidders, and secure the real purchasers in offering their bids.⁸⁵ If the owner of the premises had authorized the auctioneer to sell at public auction, without putting any limitations on his authority, a purchaser in good faith thereat, relying upon the general terms prescribed by the auctioneer, would get a good title to the property.⁸⁶ But the auctioneer cannot, at the time of sale, make representations that vary or contradict the printed conditions upon which the sale by auction proceeds.⁸⁷ He may, however, make representations that

⁷⁸ *Bush v. Cole*, 28 N. Y. 261, 84 Am. Dec. 343; *The Monte Allegre*.
⁹ *Wheat*. (U. S.) 645.

⁷⁹ *Farr v. John*, 23 Iowa, 286, 92 Am. Dec. 426.

⁸⁰ *Miller v. Baynard*, 2 Houst. (Del.) 559, 83 Am. Dec. 168.

⁸¹ *Miller v. Baynard*, 2 Houst. (Del.) 559, 83 Am. Dec. 168.

⁸² *Miller v. Baynard*, 2 Houst. (Del.) 559, 83 Am. Dec. 168.

⁸³ *Miller v. Baynard*, 2 Houst. (Del.) 559, 83 Am. Dec. 168.

⁸⁴ *Ashcom v. Smith*, 2 Pen. & W. (Pa.) 211, 21 Am. Dec. 437.

⁸⁵ *Bateman*, Auctions, § 114; *Holder v. Jackson*, 11 U. C. C. P. 543.

⁸⁶ *Bush v. Cole*, 28 N. Y. 261, 84 Am. Dec. 343.

⁸⁷ *Powell v. Edmunds*, 12 East, 7; *Shelton v. Livius*, 2 Crompt. &

are consistent with and explanatory of such printed conditions.⁸⁸

§ 900. In accepting bids.

As a necessary incident to the power to conduct the sale the auctioneer has the implied power to accept bids and may prescribe the rules of bidding. An auction being an open sale, he cannot, in general, refuse to accept bids that comply with the prescribed rules of bidding,⁸⁹ but where the sale is advertised as "without reserve" he ought not to accept a bid from the vendor or any one acting on his behalf.⁹⁰ Nor is he obliged to take the bid of an irresponsible or insufficient person.⁹¹ And he should refuse the bid of a person who is laboring under some incapacity, such as a lunatic, infant, drunken person, or person standing in a fiduciary relation to the property sold.⁹² He may also refuse trifling advances offered by bidders in the course of the sale, especially where that kind of bidding is initiated at the outset and the sum so offered is incommensurate with the actual known value of the property.⁹³ He may require bidders to be ready to comply with the terms of sale, and may exercise his discretion as to the sufficiency of security furnished by a bidder.⁹⁴ So he may refuse to accept a further bid from the owner of the property, where the latter has reserved the right to make one bid, and has already exercised

J. 411; *Poree v. Bonneval*, 6 La. Ann. 386; *Layton v. Hennen*, 3 La. Ann. 1; *Chouteau v. Goddin*, 39 Mo. 229, 90 Am. Dec. 462.

⁸⁸ *Chouteau v. Goddin*, 39 Mo. 229, 90 Am. Dec. 462; *Lessee of Wright v. Deklyne*, Pet. C. C. 204, Fed. Cas. No. 18,076; *Rankin v. Matthews*, 29 N. C. (7 Ired.) 286; *Satterfield v. Smith*, 33 N. C. (11 Ired.) 60; *Cannon v. Mitchell*, 2 Desaus. Eq. (S. C.) 321; *Wainwright v. Read*, 1 Desaus. Eq. (S. C.) 573, 582.

⁸⁹ *Holder v. Jackson*, 11 U. C. C. P. 543.

⁹⁰ *Warlow v. Harrison*, 1 El. & El. 295; *Thornett v. Haines*, 15 Mees. & W. 367.

⁹¹ *Hobbs v. Beavers*, 2 Ind. 142, 52 Am. Dec. 500; *Den v. Zellers*, 7 N. J. Law, 153; or insolvent person, *Taylor v. Harnett*, 26 Misc. (N. Y.) 362.

⁹² *Kinney v. Showdy*, 1 Hill (N. Y.) 544.

⁹³ *Taylor v. Harnett*, 26 Misc. (N. Y.) 362.

⁹⁴ *Michel v. Kaiser*, 25 La. Ann. 57.

that right.⁹⁵ So generally, he may exercise his discretion as to whether he will receive a bid from a particular person.⁹⁶ It is not necessary that a bid should be accepted in any special form, for although it is usually accepted by the fall of the hammer, it may also be done by any words or signs that manifest to the bidder that he may have the property upon paying the amount of his bid and complying with the terms of sale.⁹⁷ Where two or more persons claim the bid on property that has been knocked down, it may be put up for sale again at that bid, as the bid of such of these persons as the auctioneer sees fit.⁹⁸

§ 901. To collect purchase money or deposits.

There is a difference between the sale of real and personal property, as to the extent of the auctioneer's authority to collect the purchase price. In the absence of anything showing a contrary intention, an auctioneer authorized to sell and deliver personal property, has implied authority to receive the purchase money.⁹⁹ But where he has been employed to sell real estate, ordinarily he would not be entitled to receive the price. Where, however, the terms of his employment, and of the authorized sale, contemplate such payment at the time of the auction, and before the completion of the sale by a delivery of the deed, his implied authority may extend to receiving the deposit and so much of the purchase price as the terms of the sale require to be paid down,¹⁰⁰ though it is not essential that he should

⁹⁵ *Parfitt v. Jepson*, 36 Law T. (N. S.) 251, 46 Law J. Q. B. 529.

⁹⁶ *Holder v. Jackson*, 11 U. C. C. P. 543.

⁹⁷ *Coker v. Dawkins*, 20 Fla. 141; *Chamberlain v. Bain*, 27 Ill. App. 634; *Grotenkemper v. Achtermeyer*, 11 Bush (Ky.) 222; *State v. Hoboken Second Nat. Bank*, 84 Md. 325; *Sherwood v. Reade*, 7 Hill (N. Y.) 431.

⁹⁸ *Conover v. Walling*, 15 N. J. Eq. 173; *Warehime v. Graf*, 83 Md. 98. And see *Ives v. Tregent*, 29 Mich. 390.

⁹⁹ *Thompson v. Kelly*, 101 Mass. 291, 3 Am. Rep. 353; *Coppin v. Walker*, 7 Taunt. 237; *Williams v. Millington*, 1 H. Bl. 81.

¹⁰⁰ *Thompson v. Kelly*, 101 Mass. 291, 3 Am. Rep. 353; *Sykes v. Giles*, 5 Mees. & W. 645; *Johnson v. Buck*, 35 N. J. Law, 338, 10 Am. Rep. 243. See, also, *Johnson v. Barkley*, 47 La. Ann. 98.

receive the deposit or amount to be paid down, on the day of sale.¹⁰¹

As a general rule he may not receive anything but cash in payment.¹⁰² Thus, he has no implied authority to receive as payment a check upon a bank, in which the drawer has at the time no funds,¹⁰³ nor a bill of exchange.¹⁰⁴ But where it is customary for an auctioneer to receive a check in lieu of cash for the deposit, such a payment may be received, and the auctioneer will not be guilty of negligence although the check was dishonored.¹⁰⁵

§ 902. To sue purchaser in his own name.

An auctioneer has a special property in goods that are delivered to him to be sold, and sold by him, and a lien thereon for the charges of sale, the commission and auction duty; so that he may maintain an action in his own name for the purchase price, or for the goods themselves,¹⁰⁶ although the sale is at the owner's house, and the goods were known to be his property.¹⁰⁷ This also applies to an assignee of such auctioneer.¹⁰⁸ And it has been held that a public

¹⁰¹ *Pinckney v. Hagadorn*, 1 Duer (N. Y.) 89.

¹⁰² *Sykes v. Giles*, 5 Mees. & W. 645; *Ferrers v. Robins*, 2 Crompt. M. & R. 152; *Williams v. Millington*, 1 H. Bl. 81; *Williams v. Evans*, L. R. 1 Q. B. 352.

¹⁰³ *Moulton v. Bowker*, 115 Mass. 36, 19 Am. Rep. 312, *Huffcut*, Cas. 226.

¹⁰⁴ *Sykes v. Giles*, 5 Mees. & W. 645; *Williams v. Evans*, L. R. 1 Q. B. 352; *Taylor v. Wilson*, 11 Metc. (Mass.) 44, 45 Am. Dec. 180.

¹⁰⁵ *Farrer v. Lacy*, 25 Ch. Div. 636.

¹⁰⁶ *Williams v. Millington*, 1 H. Bl. 81; *Robinson v. Rutter*, 4 El. & Bl. 954; *Beller v. Block*, 19 Ark. 566; *Flanigan v. Crull*, 53 Ill. 352; *Millar v. Campbell*, 3 A. K. Marsh. (Ky.) 526; *Thompson v. Kelly*, 101 Mass. 291, 3 Am. Rep. 353; *Tyler v. Freeman*, 3 Cush. (Mass.) 261; *Hulse v. Young*, 16 Johns. (N. Y.) 1; *Minturn v. Main*, 7 N. Y. 220; *Nixon v. Zuricalday*, 12 App. Div. (N. Y.) 287.

¹⁰⁷ *Williams v. Millington*, 1 H. Bl. 81. In this case Lord Loughborough, C. J., held, that the auctioneer had a possession of the goods, coupled with an interest in them, and not a bare custody, like a servant or a shopman, and that it made no difference whether the sale be on the owner's premises, or in a public auction room; for, in both cases, there is an actual possession, and not a bare authority to sell.

¹⁰⁸ *Nixon v. Zuricalday*, 12 App. Div. (N. Y.) 287.

auctioneer who sells goods for another may maintain an action for the price, although he has received his advances and commissions and has no interest in the property sold or its proceeds.¹⁰⁹ But this right of the auctioneer is subject to the principal's right to take the collection into his own hands, and maintain an action in his own name.¹¹⁰

In the case of real estate, however, the auctioneer ordinarily does not have authority to receive the purchase price. "But when the terms of his employment, and of the authorized sale, contemplate the payment of a deposit into his hands at the time of the auction, and before the completion of the sale by the delivery of the deed, he stands, in relation to such deposit, in the same position as he does to the price of personal property sold and delivered by him. He may receive and receipt for the deposit; his lien for commissions will attach to it; and we see no reason why he may not sue for it in his own name, whenever an action for the deposit, separate from the other purchase money, may become necessary."¹¹¹

§ 903. Cannot sell on credit.

It is the ordinary power of an auctioneer to sell for cash only, and hence it is a necessary corollary to this rule that he has no power to sell on credit, unless there is a custom or special authority to that effect;¹¹² and if he does give credit, without authority, for the payment of goods sold by him, he will be liable to his principal for any loss that may result therefrom.¹¹³

§ 904. Nor sell at private sale.

It is one of the elements of the definition of an auctioneer that he "sell at public auction." An auctioneer therefore

¹⁰⁹ *Minturn v. Main*, 7 N. Y. 220.

¹¹⁰ *Girard v. Taggart*, 5 Serg. & R. (Pa.) 19, 9 Am. Dec. 327.

¹¹¹ *Thompson v. Kelly*, 101 Mass. 291, 3 Am. Rep. 353; *Johnson v. Buck*, 35 N. J. Law, 338, 10 Am. Rep. 243.

¹¹² *Williams v. Millington*, 1 H. Bl. 81; *Sykes v. Giles*, 5 Mees. & W. 645; *Williams v. Evans*, L. R. 1 Q. B. 352; *Townes v. Birchett*, 12 Leigh (Va.) 173.

¹¹³ *Williams v. Millington*, 1 H. Bl. 82.

has no implied power to sell property at private sale.¹¹⁴ And if authority to do so should be, expressly or impliedly, given to him, he would not, in such private sale, be acting in the capacity of auctioneer, but as a special agent. But where property is put up at public auction and not sold, and it is then sold by the auctioneer by private contract at the reserved price, it was held to be a valid and binding contract.¹¹⁵ So a mere power to sell given to a special agent does not empower him to sell at auction.¹¹⁶

§ 905. Nor delegate his authority.

An auctioneer is an agent of special trust and confidence and his duties call for the exercise of judgment and discretion; and, as in the cases of all other agencies of like character, he has no implied authority to delegate the performance of such duties to another, without special authority so to do.¹¹⁷ But he may authorize another to use the hammer and make the outcry under his immediate direction and supervision, and he may occasionally absent himself from the room during the sale.¹¹⁸ It is not essential that he should perform all of the mechanical or ministerial duties connected with the sale. If he performs all duties involving the exercise of discretion he may delegate the mechanical duties to another.¹¹⁹

§ 906. Nor rescind the sale.

An auctioneer's power is to sell only, with such implied powers as may be necessary to effect that end; but, as such,

¹¹⁴ *Marsh v. Jelf*, 3 Fost. & F. 234; *Drury v. Defontaine*, 1 Taunt. 131; *Daniel v. Adams*, 2 Amb. 495; *Seton v. Slade*, 7 Ves. 276. See, also, *Cherry v. Stein*, 11 Md. 1; *Tyson v. Mickle*, 2 Gill (Md.) 376.

¹¹⁵ *Else v. Barnard*, 28 Beav. 228; *Bousfield v. Hodges*, 33 Beav. 90.

¹¹⁶ *Towle v. Leavitt*, 23 N. H. 360, 55 Am. Dec. 195.

¹¹⁷ *Coles v. Trecothick*, 9 Ves. 234, 250; *Stone v. State*, 12 Mo. 400; *Com. v. Harnden*, 19 Pick. (Mass.) 482; *Singer Mfg. Co. v. Chalmers*, 2 Utah, 542.

¹¹⁸ *Com. v. Harnden*, 19 Pick. (Mass.) 482; *Poree v. Bonneval*, 6 La. Ann. 386; *Snow v. Warwick Sav. Inst.*, 17 R. I. 66; *Stone v. State*, 12 Mo. 400.

¹¹⁹ *Poree v. Bonneval*, 6 La. Ann. 386; *Singer Mfg. Co. v. Chalmers*, 2 Utah, 542, 547; *Snow v. Warwick Sav. Inst.*, 17 R. I. 66.

he has no power to rescind a sale made by him.¹²⁰ His authority usually ceases upon the completion of the sale, and after that time he can do nothing to vary the contract of sale or its terms, unless specially authorized to do so.¹²¹

§ 907. Nor warrant property.

An auctioneer, as such, has no implied authority to warrant property sold by him.¹²² Thus, he cannot bind an administrator personally by a warranty of the condition of the goods of the estate.¹²³

§ 908. Nor bid for himself or another.

It is a well settled principle of the law of agency that an agent employed to sell cannot purchase the subject-matter of the agency either for himself or for another.¹²⁴ This principle is applicable as well to auctioneers as to any other agents, and, when an auctioneer is employed to sell property, he has no implied authority to bid at such sale either for himself or for another,¹²⁵ though it has been held that an auctioneer may fairly and secretly bid for a third person who employs him, but not for the owner.¹²⁶ "It is impos-

¹²⁰ *Boineast v. Leignez*, 2 Rich. Law (S. C.) 464; *Nelson v. Aldridge*, 2 Starkie, 435.

¹²¹ *Nelson v. Aldridge*, 2 Starkie, 435; *Boineast v. Leignez*, 2 Rich. Law (S. C.) 464.

¹²² *Payne v. Leconfield*, 51 Law J. Q. B. 642; *Hill v. Balls*, 27 Law J. Exch. 45; *Craig v. Miller*, 22 U. C. C. P. 348; *The Monte Allegre*, 9 Wheat. (U. S.) 647; *Court v. Snyder*, 2 Ind. App. 440, 50 Am. St. Rep. 247; *Blood v. French*, 9 Gray (Mass.) 197; *Upton v. Suffolk County Mills*, 11 Cush. (Mass.) 586, 59 Am. Dec. 163.

¹²³ *Blood v. French*, 9 Gray (Mass.) 197.

¹²⁴ *Harrison v. McHenry*, 9 Ga. 164, 52 Am. Dec. 435.

¹²⁵ *Oliver v. Court*, 8 Price, 127; *Parfitt v. Jepson*, 46 Law J. C. P. 529; *Veazie v. Williams*, 3 Story, 611, Fed. Cas. No. 16,907; *Harrison v. McHenry*, 9 Ga. 164, 52 Am. Dec. 435; *Mapps v. Sharpe*, 32 Ill. 13; *Kruse v. Steffens*, 47 Ill. 112; *Hood v. Adams*, 128 Mass. 207; *Campbell v. Swan*, 48 Barb. (N. Y.) 109; *Gallatian v. Cunningham*, 8 Cow. (N. Y.) 361; *Flannery v. Jones*, 180 Pa. 338; *Randall v. Lautenberger*, 16 R. I. 158; *Scott v. Mann*, 36 Tex. 157; *Brock v. Rice*, 27 Grat. (Va.) 812.

¹²⁶ *Flannery v. Jones*, 180 Pa. 338, 57 Am. St. Rep. 648. And see *Richards v. Holmes*, 18 How. (U. S.) 143.

sible with good faith to combine the inconsistent capacities of seller and buyer, crier and bidder, in one and the same transaction. If the commissioner or auctioneer faithfully discharges his duties, he will, of course, honestly obtain the best price he can for the property. On the other hand, if he undertakes to become the purchaser for himself, or for another, his interest and his duty alike prompt him to obtain the property upon the most advantageous terms. There is an irreconcilable conflict between the two positions. And so the courts have always held."¹²⁷ So if an auctioneer discourages bidding so as to be enabled to secure the property himself at a low price, it is such a fraud as will vitiate the sale.¹²⁸ But this rule refers only to those cases that are conducted by the auctioneer. Where one acts as auctioneer or crier for an officer, and in his presence, at a sale of property under a writ, he has a right to bid at such sale, but if the crier was himself conducting the sale, then he would have no such right.¹²⁹

§ 909. Nor make representations.

In sales at public auction, the auctioneer has no implied authority to make representations in regard to the sale, and the seller will not be bound by such, unless he ratifies them, the advertisement being the only representation by which he is concluded.¹³⁰ The printed conditions under which a sale by auction proceeds cannot be varied or contradicted by parol evidence of the verbal statements of the auctioneer made at the time of sale, unless it be for the purpose of proving fraud.¹³¹ And if, at an auction sale of land, one of the auctioneers states that he has assisted in measuring it, and that it is of certain dimensions, which he specifies, one who purchases, relying on such statements, is not bound by

¹²⁷ *Staples, J.*, in *Brock v. Rice*, 27 Grat. (Va.) 812.

¹²⁸ *Brotherline v. Swires*, 48 Pa. 68.

¹²⁹ *Swires v. Brotherline*, 41 Pa. 135, 80 Am. Dec. 601; *Crook v. Williams*, 20 Pa. 342.

¹³⁰ *Poree v. Bonneval*, 6 La. Ann. 386.

¹³¹ *Chouteau v. Goddin*, 39 Mo. 229, 90 Am. Dec. 462; *Powell v. Edmunds*, 12 East, 7; *Shelton v. Livius*, 2 Crompt. & J. 411; *Lessee of Wright v. Deklyne*, Pet. C. C. 204, Fed. Cas. No. 18,076.

his bid, and may recover any payment made by him, though the sale was made on the premises, and they were inclosed by visible fences, and the purchaser knew that the property sold did not extend beyond them.¹³² But the auctioneer may, at the time of sale, make representations consistent with and explanatory of what is said in the advertisement.¹³³ Thus, a house fitted only with cold water was advertised for sale at auction as fitted with "hot and cold water," and subject to examination at any time before sale. The mistake was announced by the auctioneer at the opening of the sale. The purchaser who had read the advertisement, but had not examined the property and had arrived at the sale after the explanation by the auctioneer, refused to complete the sale. It was held that, in the absence of fraud, the sale was valid and binding on the purchaser.¹³⁴ And it has been held that the auctioneer could withdraw the express warranty contained in a catalogue of articles for sale, and it would make no difference that the purchaser did not hear the withdrawal.¹³⁵

E. Duties and Liabilities of Auctioneer as to Principal.

§ 910. To obey instructions.

It is the duty of an auctioneer, employed to sell property, to obey all the instructions of his principal in reference thereto; and if he disobeys such instructions and sells in violation thereof, he will be liable to the principal for any loss sustained thereby.¹³⁶ Thus, if the price is limited, it is his duty to set the goods up at that price; if they will

¹³² *Roberts v. French*, 153 Mass. 60, 25 Am. St. Rep. 611.

¹³³ *Lessee of Wright v. Deklyne*, Pet. C. C. 204, Fed. Cas. No. 18,076; *Chouteau v. Goddin*, 39 Mo. 229, 90 Am. Dec. 462; *Rankin v. Matthews*, 29 N. C. (7 Ired.) 286; *Morrison v. Morrison*, 6 Watts & S. (Pa.) 518; *Cannon v. Mitchell*, 2 Desaus. Eq. (S. C.) 321.

¹³⁴ *Thompson v. Kelly*, 101 Mass. 291, 3 Am. Rep. 353.

¹³⁵ *Craig v. Miller*, 22 U. C. C. P. 348.

¹³⁶ *Brown v. Staton*, 2 Chit. 353; *Bexwell v. Christie*, Cowp. 395; *Williams v. Evans*, L. R. 1 Q. B. 352; *Williams v. Poor*, 3 Cranch. C. C. 251, Fed. Cas. No. 17,732; *Bush v. Cole*, 28 N. Y. 261, 84 Am. Dec. 343; *Hazul v. Dunham*, 1 Hall (N. Y.) 655; *Steele v. Ellmaker*, 11 Serg. & R. (Pa.) 86; *Wilkinson v. Campbell*, 1 Bay (S. C.) 169.

not sell at the price limited, he must not sell, and if the goods perish, because they cannot be sold at that price, the loss will be upon the owner.¹³⁷ If he sells for less than the authorized price, he is liable to the owner for the deficiency.¹³⁸ An auctioneer selling realty for less sum than he is authorized to do, and at such sale signing the contract as agent of an undisclosed principal, does not thereby bind the owner of the property, but becomes personally liable, under the contract, to refund, to the purchaser, the amount of any deposit he may make, and auctioneer's fees, with interest; and if he knew he was not authorized so to sell, he will also be held liable for what the premises were worth over and above the price the purchaser was to pay therefor.¹³⁹ It is also his duty to follow the terms of the sale, when these are known, and no others, so that if the terms provide for an interest-bearing note, with surety, cash cannot be received instead.¹⁴⁰

§ 911. To use due care and skill.

An auctioneer by seeking employment, as such, holds himself out to the world as possessing that degree of skill, care, and prudence usually exercised by others in his calling. And, when he contracts with the vendor to sell the latter's property, he impliedly contracts that he will use a reasonable degree of skill, care, and diligence in the conduct of the sale, whether in prescribing the terms, accepting the bids, or in other matters in the course of his employment. If he fails to use such skill and diligence, he will be liable to his principal for any injury that may result from his negligence.¹⁴¹ But an auctioneer does not assume that he will make no mistakes whatever, or that he will use skill

¹³⁷ *Williams v. Poor*, 3 Cranch, C. C. 251, Fed. Cas. No. 17,732; *Hazul v. Dunham*, 1 Hall (N. Y.) 655.

¹³⁸ *Steele v. Ellmaker*, 11 Serg. & R. (Pa.) 86.

¹³⁹ *Bush v. Cole*, 28 N. Y. 261, 84 Am. Dec. 343.

¹⁴⁰ *Morgan v. East*, 126 Ind. 42.

¹⁴¹ *Kavanagh v. Cuthbert*, 9 Ir. R. C. L. 136; *Denew v. Daverell*, 3 Camp. 451; *Cull v. Wakefield*, 6 U. C. Q. B. (O. S.) 178; *Townsend v. Van Tassel*, 8 Daly (N. Y.) 261; *Hicks v. Minturn*, 19 Wend. (N. Y.) 550.

and diligence other than that ordinarily used by men in his calling. He will not be liable for losses that may arise by reason of a mistake made by him upon a doubtful point of law or upon a point just lately decided.¹⁴²

§ 912. To account.

It is an auctioneer's duty, when conducting a sale, to keep a full account of all sales and of the moneys collected by him, and, when requested, to render an account to his principal.¹⁴³ And where an action is brought against him to recover the purchase price of goods sold by him, he has no authority or right to dispute the principal's title to the goods.¹⁴⁴ Where an auctioneer sells land for an owner, and receives a portion of the purchase money, which he returns to the purchaser because of an alleged defect in the title after a tender of proper conveyance by the owner, and notice in writing not to return the money, he will be liable to his principal for the amount so returned as money received and had to the use and benefit of his principal.¹⁴⁵ In rendering his account, however, he may deduct, from the proceeds, his commissions and any other costs or expenses that may not be included in his commissions.¹⁴⁶ He has this right by reason of his lien, which will be seen hereafter.¹⁴⁷ Ordinarily he need not account for interest on money collected, unless it is held by him with a fraudulent intent;¹⁴⁸ or unless he improperly refuses to pay it over upon demand.¹⁴⁹

¹⁴² *Hicks v. Minturn*, 19 Wend. (N. Y.) 550.

¹⁴³ *Harington v. Hoggart*, 1 Barn. & Adol. 577; *Tripp v. Barton*, 13 R. I. 130; *Parsons v. Dewsbury*, 3 Times Law R. 354.

¹⁴⁴ *Hutchinson v. Gordon*, 2 Har. (Del.) 179; *Osgood v. Nichols*, 5 Gray (Mass.) 420. See, also, *Allen v. Brown*, 5 Mo. 323.

¹⁴⁵ *Montgomery v. Pacific Coast Land Bureau*, 94 Cal. 284, 28 Am. St. Rep. 123.

¹⁴⁶ *Harlow v. Sparr*, 15 Mo. 184; *Carpenter v. Le Count*, 22 Hun (N. Y.) 106; *Russell v. Miner*, 25 Hun (N. Y.) 114.

¹⁴⁷ See post, § 921.

¹⁴⁸ *Turner v. Burkinshaw*, 2 Ch. App. 488.

¹⁴⁹ *Lee v. Munn*, 1 Moore, 481, 8 Taunt. 45; *Gaby v. Driver*, 2 Younge & J. 549.

§ 913. To care for property.

It is also an auctioneer's duty to use a reasonable degree of care in keeping property sent to him for sale; and if they are lost or injured by reason of his failing to use such care, he will be liable to his principal therefor.¹⁵⁰ But if he has been guilty of no negligence on his part, he will not be liable for any injury to the property, caused by unavoidable accident, or otherwise.¹⁵¹ He does not, however, impliedly undertake to insure them; but he may agree to do so, and if he does agree to insure, he must do so or notify his principal of his failure. Otherwise, he will be liable for a loss occasioned by fire.¹⁵²

F. Rights, Duties, and Liabilities of Auctioneers as to Third Persons.

§ 914. For not disclosing his principal.

When an auctioneer sells goods at public auction he, like all other agents, should disclose the name of his principal; and if he does not do so, he himself becomes liable as vendor, and the purchaser is entitled to look to him personally for the completion of the sale.¹⁵³ As has been said: "At this day the law must be considered as settled that a vendor or purchaser dealing in his own name, without disclosing the name of his principal, is personally bound by his contracts; and it makes no difference that he is known to the other party to be an auctioneer, or broker, who is usually employed in selling property as the agent for others."¹⁵⁴ And "the mere fact that defendants were acting as auctioneers is not of itself notice that they were not selling their own

¹⁵⁰ *Maltby v. Christie*, 1 Esp. 340.

¹⁵¹ *Maltby v. Christie*, 1 Esp. 340.

¹⁵² See *Callander v. Oelrichs*, 5 Bing. N. C. 58; *Shoenfeld v. Fleisher*, 73 Ill. 404; *Johnson v. Campbell*, 120 Mass. 449.

¹⁵³ *Hanson v. Roberdeau*, Peake, 120; *Franklyn v. Lamond*, 4 C. B. 637; *Woolfe v. Horne*, 2 Q. B. Div. 355; *Seemuller v. Fuchs*, 64 Md. 217, 54 Am. Rep. 766; *Schell v. Stephens*, 50 Mo. 375; *Mills v. Hunt*, 20 Wend. (N. Y.) 431; *Bush v. Cole*, 28 N. Y. 261, 84 Am. Dec. 343; *Elison v. Wulff*, 26 Ill. App. 616; *Thomas v. Kerr*, 3 Bush (Ky.) 619, 96 Am. Dec. 262; *Davie v. Lynch*, 1 Willson Civ. Cas. Ct. App. (Tex.) § 695.

¹⁵⁴ *Mills v. Hunt*, 20 Wend. (N. Y.) 433.

goods, and they must be deemed to have been vendors, and responsible as such for title, unless they disclosed at the time the name of the principal."¹⁵⁵ Thus, where such a sale has been made and the purchaser is afterwards divested by a superior title, he may recover the purchase money of the auctioneer.¹⁵⁶ But in order that a contract may be enforced against an auctioneer, who does not disclose his principal, it must be a valid contract and one that could be enforced against the principal if disclosed.¹⁵⁷

§ 915. Duty as to deposits.

When the terms of sale require that a deposit of part of the purchase money shall be made at the time of the sale, it is the duty of the auctioneer to collect such deposit, and retain it, as a stakeholder, until the party to whom it is due is ascertained by the completion or rescission of the contract;¹⁵⁸ and he should not pay it to either party without the consent of the other.¹⁵⁹ If the vendor fails to make out a good title or complete the sale, or if for any reason the contract is rescinded, it is the auctioneer's duty to return such deposit to the purchaser,¹⁶⁰ and if in the meantime he had turned over the deposit to the vendor he will be personally liable to refund the amount thereof to the purchaser.¹⁶¹ Thus if the vendor refuses or is unable to perform the contract,¹⁶² or if the contract is rescinded on the ground of

¹⁵⁵ Schell v. Stephens, 50 Mo. 379.

¹⁵⁶ Seemuller v. Fuchs, 64 Md. 217, 54 Am. Rep. 766.

¹⁵⁷ Baltzen v. Nicolay, 53 N. Y. 467.

¹⁵⁸ Harington v. Hoggart, 1 Barn. & Adol. 577; Edwards v. Hodding, 5 Taunt. 815; Burrough v. Skinner, 5 Burrow, 2639; Gray v. Gutteridge, 3 Car. & P. 40.

¹⁵⁹ Ellison v. Kerr, 86 Ill. 427.

¹⁶⁰ Duncan v. Cafe, 2 Mees. & W. 244; Burrough v. Skinner, 5 Burrow, 2639; Early v. Smyth, 7 Ir. C. L. 397; Robinson v. Trofitter, 11 Allen (Mass.) 339; Roberts v. French, 153 Mass. 60, 25 Am. St. Rep. 612; Teaffe v. Simmons, 11 Allen (Mass.) 342; Bleeker v. Graham, 2 Edw. Ch. (N. Y.) 648; Cockcroft v. Muller, 71 N. Y. 367; Mahon v. Liscomb, 46 N. Y. State Rep. 932.

¹⁶¹ Edwards v. Hodding, 5 Taunt. 815; Furtado v. Lumley, 6 Times Law R. 168; Burrough v. Skinner, 5 Burrows, 2639; Gray v. Gutteridge, 3 Car. & P. 40.

¹⁶² Boyman v. Gutch, 7 Bing. 379.

fraud or misrepresentation,¹⁶³ the purchaser is entitled to the deposit; but not to interest thereon unless he has made a demand for it and the auctioneer improperly refuses to pay it over, or unless notice has been given to the auctioneer that the contract is rescinded.¹⁶⁴ But if it is expressly agreed that the deposit shall be forfeited upon the failure of the purchaser to comply with his contract, it cannot be recovered back by the purchaser if he does not comply with his bid.¹⁶⁵ If, however, the sale is completed, the deposit is to be paid to the vendor¹⁶⁶ subject to a deduction for the auctioneer's commission and charges, if not otherwise paid.¹⁶⁷ And if there are adverse claims to the deposit money received by the auctioneer—one party insisting on its return, and the other on its being paid over—the auctioneer may file a bill of interpleader to have the ownership or title to such money decided.¹⁶⁸ But although it is the auctioneer's duty to hold the deposit as a stakeholder, he is so far the agent of the vendor in receiving it that the vendor is responsible to the purchaser in the event of a loss through the insolvency of the auctioneer.¹⁶⁹

§ 916. For false representations.

An auctioneer may also be held liable to the purchaser for any damages sustained by reason of his false representations.¹⁷⁰

§ 917. For conversion.

An auctioneer who takes property into his possession from one not the true owner, and sells it in good faith and pays

¹⁶³ *Thornett v. Haines*, 15 Mees. & W. 367; *Wrayton v. Naylor*, 24 Can. Sup. Ct. 295; *McKeag v. Piednor*, 74 Mo. App. 593.

¹⁶⁴ *Lee v. Munn*, 8 Taunt. 45; *Gaby v. Driver*, 2 Younge & J. 549.

¹⁶⁵ *Donahue v. Parkman*, 161 Mass. 412, 42 Am. St. Rep. 415; *Thompson v. Kelly*, 101 Mass. 299, 3 Am. Rep. 353; *Bullock v. Adams' Ex'rs*, 20 N. J. Eq. 367.

¹⁶⁶ *Harington v. Hoggart*, 1 Barn. & Adol. 577; *Bleeker v. Graham*, 2 Edw. Ch. (N. Y.) 647; *Thomas v. Brown*, 1 Q. B. Div. 714.

¹⁶⁷ *Post*, § 921.

¹⁶⁸ *Bleeker v. Graham*, 2 Edw. Ch. (N. Y.) 647.

¹⁶⁹ *Rowe v. May*, 18 Beav. 613; *Smith v. Jackson*, 1 Madd. 620; *Annesley v. Muggridge*, 1 Madd. 596.

¹⁷⁰ *Ruben v. Lewis*, 20 Misc. (N. Y.) 583.

over the proceeds, less his commissions to his principal, is liable to the true owner for its conversion, although such auctioneer has no knowledge of want of title in the party for whom he sells.¹⁷¹ Thus it has been held that an auctioneer would be liable for conversion, where he in good faith received and sold property from one whom he supposed to have the right to sell, but who in fact had not.¹⁷² And most undoubtedly would he be liable if he proceeded to sell or pay over the proceeds to his principal, without the true owner's authority, after notice that his principal was not the true owner, and had not the right to direct the sale of the property.¹⁷³ But in a Tennessee case, where an auctioneer, in the regular course of his business, receives mortgaged chattels from the mortgagor, and sells them and pays over the proceeds thereof, without notice, actual or constructive, of the mortgage, it was held that he is not liable to the mortgagee as for a conversion of the goods, although the mortgagor acted fraudulently in the matter. The registration of the mortgage does not, in such a sale, operate as constructive notice to the auctioneer.¹⁷⁴ But as the auctioneer may protect himself by requiring indemnity from his principal,¹⁷⁵ the rule holding him liable for conversion in such cases, is thought to be supported by the better reason.¹⁷⁶

¹⁷¹ *Cochrane v. Rymill*, 40 Law T. (N. S.) 744; *Barker v. Furlong* [1891] 2 Ch. 172, 60 Law J. Ch. 368; *Johnston v. Henderson*, 28 Ont. 25; *Rogers v. Huie*, 1 Cal. 429, 54 Am. Dec. 300; *Swim v. Wilson*, 90 Cal. 126, 25 Am. St. Rep. 110 (*Rogers v. Huie*, 2 Cal. 571, 55 Am. Dec. 363, overruled); *Coles v. Clark*, 3 Cush. (Mass.) 399; *Robinson v. Bird*, 158 Mass. 357, 35 Am. St. Rep. 495; *Hills v. Snell*, 104 Mass. 173, 6 Am. Rep. 216; *Kearney v. Clutton*, 101 Mich. 106, 45 Am. St. Rep. 394; *Koch v. Branch*, 44 Mo. 542, 100 Am. Dec. 324; *Mohr v. Langan*, 162 Mo. 474; *Moloughney v. Hegeman*, 9 Abb. N. C. (N. Y.) 403; *Hoffman v. Carow*, 22 Wend. (N. Y.) 285; *Miller v. Laws*, 6 Ohio Dec. 736.

¹⁷² *Adamson v. Jarvis*, 4 Bing. 66; *Farebrother v. Ansley*, 1 Camp. 343.

¹⁷³ *Milliken v. Hathaway*, 148 Mass. 69.

¹⁷⁴ *Frizzell v. Rundle*, 88 Tenn. 396, 17 Am. St. Rep. 908.

¹⁷⁵ *Adamson v. Jarvis*, 4 Bing. 66. And see post, § 920.

¹⁷⁶ *Kearney v. Clutton*, 101 Mich. 106, 45 Am. St. Rep. 398.

Where one, through fraud, effects the purchase of goods, and places them in the hands of an auctioneer for sale, and the latter, in good faith, advances money upon them, or incurs expenses in relation to them, he acquires title to the goods, and is entitled to the protection of a bona fide purchaser against the claim of the original defrauded vendor,¹⁷⁷ or his creditors.¹⁷⁸ But he is not entitled to such protection if, at the time the goods were delivered to him, he had notice of the fraud or had knowledge of such circumstances calculated to put a man of ordinary prudence on inquiry as to whether the party who entrusted the goods to him was perpetrating a fraud in selling them by auction, and he failed to make the inquiry into the character of the transaction.¹⁷⁹

§ 918. Rights where third person injures property.

As has been seen, an auctioneer has a special property in goods that are in his possession; and if they are converted or injured in any way by a third person, while they are in his possession, he may bring an action against such person, either for their recovery or for their value.¹⁸⁰

G. Rights of Auctioneer against Principal.

§ 919. Right to compensation—Commissions.

Where an auctioneer is employed to sell property in the absence of an express contract or statutory provision, there is an implied agreement, on the part of the principal, to pay him the usual commissions for services rendered in making such sale, which agreement the auctioneer is entitled to enforce.¹⁸¹ The amount of such compensation or com-

¹⁷⁷ *Higgins v. Lodge*, 68 Md. 229, 6 Am. St. Rep. 437; *Murray v. Mann*, 2 Exch. 538.

¹⁷⁸ *Lewis v. Mason*, 94 Mo. 551.

¹⁷⁹ *Higgins v. Lodge*, 68 Md. 229, 6 Am. St. Rep. 437; *Morrow Shoe Mfg. Co. v. New England Shoe Co.*, 57 Fed. 685.

¹⁸⁰ See *Lewis v. Mason*, 94 Mo. 551; *Robinson v. Webb*, 11 Bush (Ky.) 464; *Beyer v. Bush*, 50 Ala. 19.

¹⁸¹ *Clark v. Smythies*, 2 Fost. & F. 83; *Green v. Bartlett*, 14 C. B. (N. S.) 681; *Rainy v. Vernon*, 9 Car. & P. 559; *Robinson v. Green*, 3 Metc. (Mass.) 159; *Johnson v. Buck*, 35 N. J. Law, 338, 10 Am. Rep.

missions will of course depend upon the facts and circumstances in each particular case. If there has been no special contract and the amount is fixed by statute, the latter would be the measure of his compensation;¹⁸² but where it is agreed that the auctioneer shall receive a certain commission for the property sold by him, such would be his compensation, and such commission would not be affected by the fact that the vendor had, in fact, made the sale, if such sale was induced by the auctioneer's advertisement.¹⁸³ If the amount is fixed neither by agreement nor by statute, then he would be entitled to recover the reasonable value of his services under the circumstances, which would usually be a question for the jury to determine.¹⁸⁴ If, however, the auctioneer had been so negligent, in the performance of his services, that the sale fails, he would not be entitled to any compensation;¹⁸⁵ though if a sale is set aside, without any fault of the auctioneer, and a second sale is made, he would be entitled to compensation for services rendered at both sales.¹⁸⁶ Nor is an auctioneer, employed to sell at public auction, entitled to compensation, if he sells by private contract.¹⁸⁷

It has been held that he could maintain an action against the purchaser for his fee, when the conditions expressly stipulate that an auctioneer's fees, of a specified sum, shall be paid to the auctioneer on the day of sale; but his right to recover will depend upon the validity of the contract to purchase, as between buyer and seller.¹⁸⁸

243; *Carpenter v. Le Count*, 22 Hun (N. Y.) 106; *Russell v. Miner*, 61 Barb. (N. Y.) 534. See, also, *Dorsett v. Houlihan*, 95 Ga. 550.

¹⁸² *Russell v. Miner*, 61 Barb. (N. Y.) 534; *Carpenter v. Le Count*, 93 N. Y. 562; *Griffin v. Helmbold*, 72 N. Y. 437; *Barry Bros. v. American White Lead & Color Works*, 107 La. 236.

¹⁸³ *Green v. Bartlett*, 14 C. B. (N. S.) 681; *Rainy v. Vernon*, 9 Car. & P. 559.

¹⁸⁴ *Clark v. Smythies*, 2 Fost. & F. 83; *The Amy Warwick*, 2 Sprague, 160, Fed. Cas. No. 344; *Carpenter v. Le Count*, 22 Hun (N. Y.) 106.

¹⁸⁵ *Denew v. Daverell*, 3 Camp. 451.

¹⁸⁶ *In re Benner's Estate*, 7 Phila. (Pa.) 333.

¹⁸⁷ *Marsh v. Jelf*, 3 Fost. & F. 234.

¹⁸⁸ *Johnson v. Buck*, 35 N. J. Law, 338, 10 Am. Rep. 243.

§ 920. Right to reimbursement—Indemnity.

Not only is the auctioneer entitled to recover commissions on the proceeds of the property sold by him; but if during the performance of his services he has reasonably and properly incurred any expenses, in behalf of his principal, he is entitled to be reimbursed therefor.¹⁸⁹ Thus, where an auctioneer's authority has been revoked before he has effected a sale, he is entitled to be reimbursed for any sum that he has properly expended up to that time.¹⁹⁰

It is also a well established rule of law that when one, upon the request of another, in good faith and without negligence, does apparently legal acts for such other, he is entitled to be indemnified against any loss or liability, sustained or incurred in the performance of such acts. This rule applies as well to auctioneers as others, and when in the course of his employment he in good faith and without negligence suffers any loss or incurs any liability on behalf of his principal, he has a legal claim against the principal therefor.¹⁹¹ As has been said: "We entertain no doubt that the owner may, at any time before the contract is legally complete, interfere and revoke the auctioneer's authority; but he does so at his peril; and, if the auctioneer has contracted any liability in consequence of his employment and the subsequent revocation and conduct of the owner, he is entitled to be indemnified."¹⁹²

§ 921. Auctioneer's lien.

An auctioneer has a lien, for his commissions and charges, upon property delivered to him to be sold, while it remains in his possession, and if it has been sold and deliv-

¹⁸⁹ *Russell v. Miner*, 61 Barb. (N. Y.) 534; *Carpenter v. Le Count*, 22 Hun (N. Y.) 106.

¹⁹⁰ *Warlow v. Harrison*, 1 El. & El. 295, 29 Law J. Q. B. 14; *Leeds v. Bowen*, 2 Abb. Pr. (N. S.; N. Y.) 43; *Girardey v. Stone*, 24 La. Ann. 286.

¹⁹¹ *Warlow v. Harrison*, 1 El. & El. 295, 29 Law J. Q. B. 14; *Adamson v. Jarvis*, 4 Bing. 66; *Girardey v. Stone*, 24 La. Ann. 286; *Russell v. Miner*, 25 Hun (N. Y.) 114, 61 Barb. 534; *Union Refining & S. Co. v. Pentecost*, 79 Pa. 491.

¹⁹² *Warlow v. Harrison*, 1 El. & El. 317.

ered, then upon the proceeds thereof collected by him.¹⁹³ And he may refuse to deliver the property to the owner, if unsold or to the purchaser when sold, until his fees have been paid.¹⁹⁴ So he may deduct his commissions and charges from the deposit or any other part of the purchase money that he has in his possession,¹⁹⁵ and he may even appropriate so much of the proceeds of sale as he may be entitled to for his commissions, to the payment of a debt due by him to the purchaser at such sale.¹⁹⁶ But where an assignment for the benefit of creditors is fraudulent, an auctioneer, to whom the assignees have entrusted the effects to be sold, has no lien upon the moneys realized from the sale, as against judgment creditors of the assignor; the auctioneer being himself a creditor, but having agreed to the assignment.¹⁹⁷

H. Liability of Purchaser or Bidder to Principal.

§ 922. For purchase price—Where property of third person included.

Although, as has been seen, the auctioneer has implied authority to receive the purchase price of property sold by him,¹⁹⁸ yet as the property belonged to the principal, the primary right to receive the purchase money and to sue therefor is in the latter.¹⁹⁹ And the purchaser will be liable to the vendor for the purchase price of the property. Until such amount is paid the seller has a lien on the prop-

¹⁹³ *Williams v. Millington*, 1 H. Bl. 81; *Woolfe v. Horne*, 2 Q. B. Div. 355, 46 Law J. Q. B. 534; *Blackburn v. Macdonald*, 6 U. C. C. P. 380; *Elison v. Wulff*, 26 Ill. App. 616; *Dowler's Succession*, 29 La. Ann. 437; *Thompson v. Kelly*, 101 Mass. 291, 3 Am. Rep. 353; *Harlow v. Sparr*, 15 Mo. 184; *Lewis v. Mason*, 94 Mo. 551; *Blum v. Torre*, 3 Hill (S. C.) 155.

¹⁹⁴ *Lane v. Tewson*, 12 Adol. & E. 116, note; *Williamson v. Millington*, 1 H. Bl. 85.

¹⁹⁵ *Dowler's Succession*, 29 La. Ann. 437; *Harlow v. Sparr*, 15 Mo. 184.

¹⁹⁶ *Harlow v. Sparr*, 15 Mo. 184.

¹⁹⁷ *Hone v. Henriquez*, 13 Wend. (N. Y.) 240, 27 Am. Dec. 204.

¹⁹⁸ *Ante*, § 901.

¹⁹⁹ *Girard v. Taggart*, 5 Serg. & R. (Pa.) 19, 9 Am. Dec. 327. And see *ante*, § 902.

erty therefor.²⁰⁰ So an auctioneer's memorandum may be specifically enforced at the instance of the vendor, although it does not state the credit on which the land was sold.²⁰¹ But unless the vendor's title to the property sold is unencumbered, he cannot compel the purchaser to accept, and recover the purchase price, unless the purchaser had notice of the encumbrance at the time he bought it.²⁰² Nor can he compel the purchaser to accept part of what he has bought, if he does not have title to the rest, as the purchaser is entitled to the whole of his purchase.²⁰³

But if such sale has been made through fraud or misrepresentation, the purchaser, upon the discovery thereof, may repudiate the sale, return the property, and not be liable for the price bid by him.²⁰⁴ And if he does not discover the fraud until it is too late to return the property before suit, he may plead the fraud in defense although he has not returned the property.²⁰⁵ Thus if, while an auctioneer is selling the goods of one man, another procures him to sell his goods, without informing him whose they are, it is a fraud, both on the auctioneer and on the bidders, such as would entitle him to whom the goods were sold to repudiate the sale upon the discovery of the fraud, and the owner could not recover the purchase price therefor.²⁰⁶

So where property has been advertised for sale as the goods of a certain person, and at the sale goods belonging to another are sent in to be sold together with those advertised, it is the duty of the seller to announce this fact, especially if the ownership would have any influence on the sale. To

²⁰⁰ *Lucas v. Wallace*, 42 Ill. App. 172.

²⁰¹ *Smith v. Jones*, 7 Leigh (Va.) 165, 30 Am. Dec. 498.

²⁰² *Porter v. Liddle*, 7 Mart. (O. S.; La.) 23.

²⁰³ *Pontchartrain R. Co. v. Durel*, 6 La. (O. S.) 481.

²⁰⁴ *Stevens v. Giddings*, 45 Conn. 507; *Clay v. Kagelmacher*, 98 Ga. 149; *McMillan v. Harris*, 110 Ga. 72, 78 Am. St. Rep. 93; *Roberts v. French*, 153 Mass. 60, 25 Am. St. Rep. 611; *King v. Knapp*, 59 N. Y. 462; *Bowman v. McClenahan*, 20 App. Div. (N. Y.) 346; *Woods v. Hall*, 16 N. C. (1 Dev. Eq.) 415; *Pugh v. Chesseldine*, 11 Ohio, 109, 37 Am. Dec. 414; *McCall v. Davis*, 56 Pa. 431, 94 Am. Dec. 92; *Flannery v. Jones*, 180 Pa. 338, 57 Am. St. Rep. 648.

²⁰⁵ *Staines v. Shore*, 16 Pa. 200, 55 Am. Dec. 492.

²⁰⁶ *Thomas v. Kerr*, 3 Bush (Ky.) 619, 96 Am. Dec. 262.

sell the goods as belonging to one person when they really belong to another may amount to a fraud,²⁰⁷ such as would entitle him to whom the goods were sold to repudiate the sale upon the discovery thereof.²⁰⁸ So where the auctioneer had sold to the defendant the goods of A. in a sale of the goods of B., it was such a fraud, that the defendant might set off a debt due to him from B. against the price of the goods of A.²⁰⁹

"Obvious prudential reasons might induce bidders to purchase goods as the property of one owner, when they would not make a bid for them as the property of a different owner. Such as the confidence they might have in one to answer in damages for a breach of the implied warranty of title, while they would have no confidence in the ability of the other, and other reasons, which may be readily imagined, and need not therefore be enumerated, would influence bidders."²¹⁰ Thus, where the goods of a gentleman deceased are catalogued, Lord Mansfield says: "Upon this representation, many people would attend to bid, on a supposition that the goods were necessarily to be sold at all events, whether valuable or not valuable; whereas they might have their suspicions if they were the property of living persons. Horses, or any other species of property, belonging to persons that are dead, are not so likely to be faulty, as those which are parted with by persons in their lifetime."²¹¹

§ 923. For refusing to complete purchase.

(a) **In general.**—If a bidder, to whom goods have been knocked down at an auction sale, refuses or fails to complete the purchase, the usual remedy of the seller of the goods is to resell the property at such purchaser's risk, and to sue him for any deficiency that may result, from the difference between

²⁰⁷ *Bexwell v. Christie*, Cowp. 395; *Coppin v. Craig*, 7 Taunt. 243; *Thomas v. Kerr*, 3 Bush (Ky.) 619, 96 Am. Dec. 262.

²⁰⁸ *Thomas v. Kerr*, 3 Bush (Ky.) 619, 96 Am. Dec. 262.

²⁰⁹ *Coppin v. Craig*, 7 Taunt. 243.

²¹⁰ *Thomas v. Kerr*, 3 Bush (Ky.) 619, 96 Am. Dec. 264.

²¹¹ *Bexwell v. Christie*, Cowp. 397.

the amount first bid and the amount received on the resale, together with the costs and expenses of such resale;²¹² or he may keep the property as his own and sue for the difference between the market value and the contract price.²¹³ Thus, where land is sold on an agreement that a certain deposit shall be made, and the balance paid within a certain time, on the failure of the purchaser to pay the balance, the vendor can resell the property, and charge the purchaser with the loss, if any, and deduct the same from the deposit.²¹⁴

(b) **Resale.**—But in such a case the resale must be fairly conducted. It is necessary and essential that the purchaser be given notice, before the resale is made, of the intention to resell at his risk, and to hold him bound for any difference between his bid and the price obtained at the resale.²¹⁵ The purchaser should be called upon to show cause why he has failed to complete his purchase, and allowed an opportunity to do so.²¹⁶ He can be held liable only for such deficiency in price as arose upon a resale, when the conditions of the

²¹² *Adams v. McMillan*, 7 Port. (Ala.) 73; *Ansley v. Green*, 82 Ga. 181; *Green v. Ansley*, 92 Ga. 647, 44 Am. St. Rep. 110; *Hendricks v. Davis*, 27 Ga. 167, 73 Am. Dec. 726; *McBrayer v. Cohen*, 92 Ky. 479; *Lalaurie v. Cahallen*, 2 La. (O. S.) 401; *Stewart v. Paulding*, 7 La. (O. S.) 506; *Springer v. Berry*, 47 Me. 330; *Mount v. Brown*, 33 Miss. 566, 69 Am. Dec. 362; *Ackerman v. Rubens*, 167 N. Y. 405, 82 Am. St. Rep. 728; *Christmas' Adm'r v. Jenkins*, 3 N. C. (2 Hayw.) 395; *Grist v. Williams*, 111 N. C. 53, 32 Am. St. Rep. 782; *McKiernan v. Valteau*, 23 R. I. 501; *Girard v. Taggart*, 5 Serg. & R. (Pa.) 19, 9 Am. Dec. 327; *Weast v. Derrick*, 100 Pa. 509; *Bowser v. Cessna*, 62 Pa. 148; *Tompkins v. Haas*, 2 Pa. 74; *Boinest v. Leigneux*, 2 Rich. Law (S. C.) 464; *Campbell v. Ingraham*, 1 Mill Const. (S. C.) 293; *Waples v. Overaker*, 77 Tex. 7, 19 Am. St. Rep. 727.

²¹³ *Ackerman v. Rubens*, 167 N. Y. 405, 82 Am. St. Rep. 728, citing *Moore v. Potter*, 155 N. Y. 481, 63 Am. St. Rep. 692; *Dustan v. McAndrew*, 44 N. Y. 72.

²¹⁴ *McKiernan v. Valteau*, 23 R. I. 501.

²¹⁵ *Green v. Ansley*, 92 Ga. 647, 44 Am. St. Rep. 110; *Riggs v. Pursell*, 74 N. Y. 370; *Hill v. Hill*, 58 Ill. 239; *Adams v. McMillan*, 7 Port. (Ala.) 73. Compare *McKiernan v. Valteau*, 23 R. I. 501, holding that it is not absolutely necessary that the first purchaser be notified of the resale.

²¹⁶ *Hill v. Hill*, 58 Ill. 239.

second sale are the same, or not more onerous than those of the first.²¹⁷ But it is not necessary, in addition to this, that any direct notice should be given him of the time and place of the resale;²¹⁸ nor is it necessary that the resale should be by public auction,²¹⁹ though that is the usual way of conducting it where the first sale was effected in that way. All that is necessary is that the second sale should be fair and honest in every way, and that the vendor shall take all reasonable means to get the most he can for the property.²²⁰ If, however, the purchaser has been misled by statements made by the auctioneer, in his principal's presence, and there has been no want of diligence on his part to ascertain the truth of the matter, he would not be liable for any deficiency in price upon a resale of the land or property.²²¹

(c) **Vendor as purchaser.**—The question may here arise as to whether the vendor may himself become the purchaser at such resale. In this connection it has been held that if the vendor purchases at a public auction sale fairly conducted upon notice to the vendee, with no suspicion of fraud or undue advantage, the sale will be valid.²²² “While the courts below,” in this case, “recognized this rule, they did not apply it, for they held that the sale at auction was no sale at all, because a man cannot sell to himself. This would be true of an attempt to make a private sale to one's self, but it is not true of a sale at private auction, fairly conducted by a licensed auctioneer, and made at a reasonable time and place, after adequate opportunity to see the property, due advertisement to the public and personal notice to the vendee, when the real purpose is to ascertain the value of the property. The law is satisfied with a fair sale, made in good faith, accord-

²¹⁷ *Weast v. Derrick*, 100 Pa. 509; *Paul v. Shallcross*, 2 Rawle (Pa.) 326.

²¹⁸ *Green v. Ansley*, 92 Ga. 647, 44 Am. St. Rep. 110.

²¹⁹ *McKiernan v. Valteau*, 23 R. I. 501, and the court gave it as its opinion in this case that it was not absolutely necessary that the first purchaser should be notified thereof.

²²⁰ *McKiernan v. Valteau*, 23 R. I. 501.

²²¹ *Clay v. Kagelmacher*, 98 Ga. 149.

²²² *Ackerman v. Rubens*, 167 N. Y. 405, 82 Am. St. Rep. 728.

ing to established business methods, with no attempt to take advantage of the vendee. * * * The primary object of the sale was not to pass title from the vendor, but to lessen the loss of the vendee. The subject of the sale had no market value, and the amount for which it could be sold depended largely upon taste and fancy. A public competitive sale by outcry to the highest bidder, duly advertised and made upon notice to the vendee, is a safer method of measuring the damages than a sale by private negotiation. A fair public sale, in the absence of other evidence, is competent evidence of value."²²³ But it is believed that this doctrine is

²²³ By Vann, J., in *Ackerman v. Rubens*, 167 N. Y. 405, 82 Am. St. Rep. 728. And as was further said in this opinion: "The plaintiff did not conduct the sale himself, but placed the yacht in the hands of a public auctioneer for sale without reservation, on account of whom it might concern. While the auctioneer was his agent he could not lawfully control him so as to prevent an honest sale. The defendant had notice and an opportunity to protect himself, yet he asked for no postponement, made no request, gave no instructions and did not even appear at the sale. If the plaintiff's agent had refrained from bidding, the property would have gone to a stranger for a less sum than it finally brought, and yet, in that event, even according to the defendant's theory, the sale would have been valid. The fact that the plaintiff outbid all competitors did not render the sale invalid, for he had a right to bid, provided he took no advantage by trying to prevent others from bidding or by disregarding any reasonable request of the defendant, or in any other way. If he had acted as auctioneer, or in collusion with the auctioneer, or there was any evidence of furtive effort on his part, or anything to challenge the fairness of the sale, the action of the trial court in virtually withdrawing the case from the jury might have been justified, but the mere fact that he was the highest bidder at a public sale, the fairness of which is not questioned in any other respect, did not warrant the direction for nominal damages only. The object of the sale was to measure the damages caused by the default of the defendant, and they were diminished instead of being increased by the action of the plaintiff. We forbear further discussion, because the question is no longer open in this court, as it was involved in a case recently decided by us upon careful consideration after full discussion by counsel (*Moore v. Potter*, 155 N. Y. 481, 63 Am. St. Rep. 692). In that case, as in this, the property was sold at auction to a representative of the vendor, and the point was distinctly made on the argument before us that as the vendor was the real purchaser, 'the sale was colorable only and absolutely with-

somewhat questionable, or at most should be applied only when it is clearly shown that the sale was fairly conducted after due notice to the vendee. As the vendor buys through the auctioneer, his agent, the tendency would be to have the auctioneer knock the property down to him at the lowest possible price, and to compel the former purchaser to pay the difference between that price and the former bid. Selling involves the idea of contracting, and a person cannot contract with himself and bind others thereby. If he can sell to himself publicly, it may be claimed that he could also do so privately, and thus be able to perpetrate a fraud or an injustice which might be difficult to detect or prove.²²⁴

I. Liability of Principal to Purchaser.

§ 924. For not completing sale.

Where the purchaser has fully complied with all the terms and conditions of the sale, but the vendor refuses or fails to complete the sale, the latter is liable to the purchaser for any loss or injury that he may have suffered by reason of such refusal, as for the return of the deposit.²²⁵ Thus, a purchaser at an auction sale of real estate, who, in accordance with the terms of sale, has paid to the auctioneer a portion of the purchase price, may, upon failure of the vendor to convey a perfect title as agreed, maintain an action to recover his deposit, either against the auctioneer or the vendor, or both, and is entitled to interest from the time of a demand for the money and a refusal to pay. He is entitled,

out effect upon the rights of the parties.' While we did not discuss the question in our opinion, it was necessarily involved, was passed upon in consultation, and decided. Both upon principle and authority we think that the amount for which the yacht was struck off to the vendor at an auction sale fairly conducted, upon notice to the vendee, with no suspicion of fraud or undue advantage, was lawful evidence of the value of the yacht and presented a case for consideration of the jury."

²²⁴ See dissenting opinion in *Ackerman v. Rubens*, 167 N. Y. 405, 82 Am. St. Rep. 728.

²²⁵ *Cockcroft v. Muller*, 71 N. Y. 367; *Teaffe v. Simmons*, 11 Allen (Mass.) 342. And see *Montgomery v. Pacific Coast Land Bureau*, 94 Cal. 284, 28 Am. St. Rep. 122.

however, to but one satisfaction, and a recovery and satisfaction of the judgment against either the vendor or the auctioneer will discharge the other.²²⁶

§ 925. For acts of auctioneer.

As in the case of all other agencies, the principal is liable for all acts done by the auctioneer within the course of his employment, and for his principal's benefit. An auctioneer is a special agent and his powers, as such, are fully laid down,²²⁷ and for all acts done within those powers, the principal would be liable. Third parties are presumed to know all the general powers of an auctioneer, as such, and if the principal puts any limitations or extensions on such powers he must give due and proper notice thereof. Having done so he would not be liable for any acts of the auctioneer in excess of such authority. Thus, he may limit the auctioneer's power not to sell for less than a certain sum, and if he does so, contrary to the limitation, his principal would not be bound thereby.²²⁸ But the principal cannot put secret limitations upon the auctioneer's general authority and escape from liability for acts done in excess of such limitations, but within his general authority. For all acts done by the auctioneer within his general powers, but beyond his actual powers, secretly limited, the injured party may look to the principal for redress.

II. MASTERS OF VESSELS.

§ 926. Definition, appointment and discharge.

The master of a ship, in maritime law, is the commander or first officer of a merchant ship; a captain. Such officer or commander is of such importance to the running of a ship that if it sails without a competent master, it is considered unseaworthy. No formalities are necessary to the appointment of a master;²²⁹ but the matter is wholly at the dis-

²²⁶ *Cockcroft v. Muller*, 71 N. Y. 367.

²²⁷ *Bush v. Cole*, 28 N. Y. 261, 84 Am. Dec. 343; *The Monte Allegre*, 9 Wheat. (U. S.) 645.

²²⁸ *Bush v. Cole*, 28 N. Y. 261, 84 Am. Dec. 343.

²²⁹ *The Boston*, 1 Blatchf. & H. 309, Fed. Cas. No. 1,669.

cretion of the owners,²³⁰ who, or a majority of whom, controlling a majority interest in the vessel, may deprive the master of his command at any time, without assigning a reason therefor, although he is a part owner of the vessel.²³¹ It is expressly provided by the United States Revised Statutes that "any person or body corporate having more than one-half ownership of any vessel shall have the same power to remove a master, who is also part owner of such vessel, as such majority owners have to remove a master not an owner. This section shall not apply where there is a valid written agreement subsisting by virtue of which such master would be entitled to the possession, nor in any case where a master has possession as part owner, obtained before the ninth day of April, 1872."²³²

All that is usually necessary to discharge the master is the declaration, by a majority of the owners, of a disinclination to continue him in power, though it has been contended that where the master is a part owner something more is necessary. As has been said: "The dispossession of a master is not an uncommon proceeding; all that the court requires in cases where the master is not a part owner is that the majority of the proprietors should declare their disinclination to continue him in possession. In the case of a master, something more is required before the court will proceed to dispossess a person who is also a proprietor of the vessel, and whose possession, therefore, the common law is upon general principles, inclined to maintain."²³³

²³⁰ Jones v. Davis, Abb. Adm. 446, Fed. Cas. No. 7,460.

²³¹ Ward v. Ruckman, 36 N. Y. 26, 93 Am. Dec. 479; Clayton v. The Eliza B. Emory, 4 Fed. 342; Diedman v. The Joseph Hume, Fed. Cas. No. 3,901; Montgomery v. Wharton, Bee, 338, Fed. Cas. No. 9,737; Childs v. Gladding, 11 Am. Law Reg. (N. S.) 386. And see The New Draper, 4 C. Rob. Adm. 287; The See Reuter, 1 Dod. 22; The Lizzie Merry, 10 Ben. 140, Fed. Cas. No. 8,423. Compare Smith-Green Co. v. Bird, 96 Me. 425, 90 Am. St. Rep. 352.

²³² Section 4250. And see Rea v. The Eclipse, 4 Dak. 218; Smith-Green Co. v. Bird, 96 Me. 425, 90 Am. St. Rep. 352; The Lizzie Merry, 10 Ben. 140, Fed. Cas. No. 8,423; Clayton v. The Eliza B. Emory, 4 Fed. 342.

²³³ The New Draper, 4 C. Rob. Adm. 287.

§ 927. Authority—In general.

The master of a vessel being appointed for the purpose of conducting the voyage on which the ship is about to engage, his powers, arising from the nature of his employment and from usage are necessarily rather broad.²³⁴ He "is a general agent to perform all things relating to the usual employment of his ship, and the authority of such an agent to perform all things usual in the line of business in which he is employed cannot be limited by any private order or direction not known to the party dealing with him."²³⁵ Masters of ships and other vessels, as agents of the owners, possess the power of equipment, outfit, repair, management, navigation, and usual employment of the vessels committed to their charge. When acting within the legitimate range of his authority, the master of a vessel acts as the agent of the owners, and binds them as their authorized agent. Likewise he binds the ship, because the policy of the maritime law had given this additional security to shippers.²³⁶

But this authority of the master is limited to objects connected with the voyage.²³⁷ It extends, in general, to all matters connected with the employment and hiring of the crew.²³⁸ But he cannot interfere with the letting of the ship though part owner.²³⁹ Nor has he authority to release a charterer from payment of the hire reserved in the charter party, nor to vary its terms.²⁴⁰ Neither can he set aside, annul, or supersede specific contracts made by the owners; but where in their absence, and in the examination of a charter party, questions are raised between the ship and the charterers, as

²³⁴ *Beldon v. Campbell*, 6 Exch. 886; *Arthur v. Barton*, 6 Mees. & W. 138.

²³⁵ *Smith*, Merc. Law, 59.

²³⁶ *The Waldo*, 2 Ware (Dav. 161) 165, Fed. Cas. No. 17,056; *Ralston v. The State Rights*, Crabbe, 22, Fed. Cas. No. 11,540; *Thompson v. Hermann*, 47 Wis. 610.

²³⁷ *Naylor v. Baltzell*, Taney, 55, Fed. Cas. No. 10,061. He has only limited power to make contracts with respect to the vessel in the home port. *The Tribune*, 3 Sumn. 144, Fed. Cas. No. 14,171.

²³⁸ *Neilson v. The Laura*, 2 Sawy. 242, Fed. Cas. No. 10,092.

²³⁹ *Tyson v. Belmont*, 28 Hunt, Mer. Mag. 583, Fed. Cas. No. 14,316.

²⁴⁰ *Balcarres Brook S. S. Co. v. Grace*, 75 Fed. 1017, 22 C. C. A. 7.

to the construction of minor clauses in the charter party, the master as agent of the owners, necessarily must deal with the same; and his construction and agreements in relation thereto are binding on the owners.²⁴¹

His powers on board the ship, as its supreme officer, are necessarily very large. He has sole and exclusive command on board.²⁴² He has complete control of the crew and may enforce obedience to his orders or those of his officers, and may use all adequate means to suppress mutinies and outbreaks.²⁴³ Likewise, he may displace officers during the voyage.²⁴⁴

§ 928. Authority by necessity.

As has been seen heretofore in this work, the master of a vessel may become the agent of the owners of the ship or cargo, by reason of necessity, in cases in which he had no express authority to represent them.²⁴⁵ In case of necessity, the master becomes the agent of all concerned in the voyage.²⁴⁶ In a foreign port, he may contract for repairs and supplies to the ship.²⁴⁷ He may hypothecate the vessel or cargo, but cannot sell the vessel.²⁴⁸ Or he may borrow money, in such cases, on the credit of the ship owners.²⁴⁹ He

²⁴¹ *The Edward H. Blake*, 92 Fed. 202, 34 C. C. A. 297.

²⁴² *Butler v. McClellan*, 1 Ware, 220, Fed. Cas. No. 2,242.

²⁴³ *United States v. Ruggles*, 5 Mason, 192, Fed. Cas. No. 16,205; *Carlton v. Davis*, 2 Ware (Dav. 221) 225, Fed. Cas. No. 2,408; *Wilson v. The Mary*, Gilp. 31, Fed. Cas. No. 17,823; *Roberts v. Eldredge*, 1 Spr. 54, Fed. Cas. No. 11,901; *Jordan v. Williams*, Curtis, 69, Fed. Cas. No. 7,528.

²⁴⁴ *United States v. Savage*, 5 Mason, 460, Fed. Cas. No. 16,225.

²⁴⁵ See ante, § 94, c. 5.

²⁴⁶ *Harrison v. Fortlage*, 161 U. S. 57; *The Sarah Ann*, 2 Sumn. 206, Fed. Cas. No. 12,342; *Hartman v. The Will*, 4 Pa. Law J. Rep. 350, Fed. Cas. No. 6,163.

²⁴⁷ *The Fortitude*, 3 Sumn. 228, Fed. Cas. No. 4,953; *Naylor v. Baltzell*, Taney, 55, Fed. Cas. No. 10,061.

²⁴⁸ *Skrine v. The Hope*, Bee, 2, Fed. Cas. No. 12,927; *Naylor v. Baltzell*, Taney, 55, Fed. Cas. No. 10,061; *The Gratitude*, 3 C. Rob. Adm. 240; *The Hamburg*, Brown & L. 253; *The Packet*, 3 Mason, 255, Fed. Cas. No. 10,654; *United Ins. Co. v. Scott*, 1 Johns. (N. Y.) 106.

²⁴⁹ *Johns v. Simons*, 2 Q. B. 425; *Arthur v. Barton*, 6 Mees. & W.

has authority, where his vessel becomes disabled and unable to proceed, and acting as an agent of necessity for the owners of the cargo to transship it, or if expedient retain it until his own ship is put in repair, or if necessary may sell part of it or hypothecate the whole, or he may abandon the voyage and notify the owners. It is his duty to deal with the cargo as a prudent and discreet owner would, if on the spot.²⁵⁰

His authority in these respects, however, is strictly limited to the necessities of the ship.²⁵¹ To justify a sale of the cargo, the necessity must be absolute and unequivocal, and is only permissible after the exhaustion of the ship's credit.²⁵² He may sell the cargo in a perishable condition, which he is unable to save or transmit, if he acts bona fide and under a stringent necessity.²⁵³ "There are emergencies under which a sale of the cargo, and even of the ship, may be justified, but the necessity of the case must require that course. This necessity may arise suddenly, and under circumstances that could not have been provided for. In general, it may be said that in such a case the master is to do that which a wise and prudent man will think most conducive to the benefit of all concerned. Some regard may be allowed to the interest of the ship and its

138; *Stearns v. Doe*, 12 Gray (Mass.) 482, 74 Am. Dec. 608; *McCready v. Thorn*, 51 N. Y. 454.

²⁵⁰ *The Gratitude*, 3 C. Rob. Adm. 240; *Hunter v. Parker*, 7 Mees. & W. 322; *Jordan v. Warren Ins. Co.*, 1 Story, 342, Fed. Cas. No. 7,524; *Pike v. Balch*, 38 Me. 302, 61 Am. Dec. 248; *Gordon v. Massachusetts F. & M. Ins. Co.*, 2 Pick. (Mass.) 249; *Naylor v. Baltzell*, Taney, 55, Fed. Cas. No. 10,061; *The Bridgewater*, 11 Chl. Leg. News, 327, Fed. Cas. No. 1,864. And see *Jones v. The Richmond*, 28 Hunt, Mer. Mag. 709, Fed. Cas. No. 7,491; *Englehart v. The Pedro*, Fed. Cas. No. 4,489.

²⁵¹ *Carrington v. The Ann C. Pratt*, 10 N. Y. Leg. Obs. 193, Fed. Cas. No. 2,445.

²⁵² *The Packet*, 3 Mason, 255, Fed. Cas. No. 10,654; *Myers v. The Harriet*, 19 Hunt, Mer. Mag. 535, Fed. Cas. No. 9,992; *The Harriet*, Fed. Cas. No. 6,094.

²⁵³ *Maas v. The Pedee*, 39 Hunt, Mer. Mag. 330, Fed. Cas. No. 8,652; *Pope v. Nickerson*, 3 Story, 465, Fed. Cas. No. 11,274; *The Velona*, 3 Ware, 139, Fed. Cas. No. 16,912.

owners, but the interest of the cargo must not be sacrificed to it. Transshipment for the place of destination, if it be practicable, is the first object, because that is in furtherance of the original purpose; if that be impracticable, return or a safe deposit may be expedient. The merchants should be consulted, if possible. A sale is the last thing that a master should think of, because it can only be justified by that necessity which supersedes all human laws. If he sell without necessity, his owners, as well as himself, will be answerable to the merchants.' ”²⁵⁴

He also possesses the power of appointing another as master in his stead and of obligating his power as master to such other, not indeed in all cases, nor in all places, but in cases of necessity or sudden emergency in a foreign port in the absence of the owner and employer or his authorized agent, whenever it may be necessary and proper for the welfare of the ship, and the due accomplishment of the voyage. So it has been said that he may contract for the employment of the vessel under circumstances of necessity.²⁵⁵

It is clearly established that the master as such has authority to sell a wrecked vessel, when he proceeds in good faith exercising his best discretion for the benefit of all concerned, and in view either of existing peril or of peril likely to ensue, from which in the opinion of persons competent to judge, she cannot be rescued.²⁵⁶ But the sale to be binding on the owners must be one of necessity.²⁵⁷

§ 929. Delegation of authority.

It may be stated as a general rule, in reference to masters of vessels, that they have no authority to delegate their

²⁵⁴ *Galther v. Myrick*, 9 Md. 118, 66 Am. Dec. 316; *Abbott, Shipp* 243.

²⁵⁵ *Naylor v. Baltzell, Taney*, 55, Fed. Cas. No. 10,061.

²⁵⁶ *The Lucinda Snow*, Abb. Adm. 305, Fed. Cas. No. 8,591; *Fitz v. The Amelie*, 2 Cliff. 440, Fed. Cas. No. 4,838; *The Herald*, 8 Ben. 409, Fed. Cas. No. 6,393; *Scull v. Briddle*, 2 Wash. C. C. 150, Fed. Cas. No. 12,569; *The William Carey*, 3 Ware, 313, Fed. Cas. No. 17,689; *New England Ins. Co. v. The Sarah Ann*, 13 Pet. (U. S.) 387, 2 Sumn. 206, Fed. Cas. No. 12,342; *The Bridgewater*, 11 Chl. Leg. News, 327, Fed. Cas. No. 1,864.

²⁵⁷ *Hartman v. The Will*, 4 Pa. Law J. Rep. 350, Fed. Cas. No. 6,163.

powers or duties to another, unless such authority has been expressly or impliedly conferred upon them. He may, however, appoint such officers or agents as are necessary to the proper running of the vessel. And a pilot selected by him is so far the agent of the vessel, that whoever is responsible for its navigation will be responsible for the pilot's acts or omissions in the line of his duty, and unless there is some express contract or some proof of facts which warrant implications or understandings at variance with uniform usage, the pilot must be held to be the servant of the owners.²⁵⁸ And in cases of necessity in a foreign port, he may appoint another as master in his stead.

— **Devolution of authority on mate.** On the separation of the master from the vessel by death or casualty, the mate succeeds to his authority as *heres necessarius*; the law imposes on him the duties and responsibilities and clothes him with the authority of master.²⁵⁹

§ 930. Duties.

The duties of a master, in general, are the same as those of any other agent: To obey the instructions of the owners, except in cases of emergency; to act with loyalty and good faith; to use reasonable care and diligence, and to do all such other acts as may be reasonably necessary for the proper conduct of the voyage, and the safety of the ship and cargo. With respect to the cargo, it is the duty of the master to receive it, properly stow and care for it during the voyage, carry it without deviation, and deliver it safely at the port to which it is consigned. With such delivery his duty to the cargo as master is at an end. In case of shipwreck, it is his duty to employ all his courage, skill, and industry in the protection and preservation of the ship and cargo.²⁶⁰

²⁵⁸ *Bramble v. Culmer*, 78 Fed. 497, 24 C. C. A. 182; *Smith v. The Creole*, 2 Wall. Jr. 485, Fed. Cas. No. 13,033.

²⁵⁹ *Carrington v. The Ann C. Pratt*, 10 N. Y. Leg. Obs. 193, Fed. Cas. No. 2,445; *The Boston*, 1 Blatchf. & H. 309, Fed. Cas. No. 1,669.

²⁶⁰ *Phillips v. McCall*, 4 Wash. C. C. 141, Fed. Cas. No. 11,104. Other discussions of the powers and duties of the master of a vessel will be found in preceding sections of this work.

§ 931. Actions and suits by.

The general agency of the master for the owners of the vessel and his general property therein, and in the cargo and freight, vests him with authority to sue in his own name in all cases when the owners would have a right of action concerning the vessel.²⁶¹

§ 932. Master's lien.

A master of a vessel has a lien on the vessel or on the freight for moneys necessarily disbursed by him,²⁶² but it is the settled law that the master has no lien on the ship or on the freight for his wages, but must pursue his remedy in that respect by an action in personam.²⁶³

§ 933. Master as supercargo.

Sometimes the master is also supercargo superadding the rights and duties of that position to those pertaining to his character of master.²⁶⁴

§ 934. Liability of owner for acts of master.

As a general rule, the owners of a vessel are liable for all acts done by the master of such vessel within the course of his employment. They are liable for all torts committed by the master while pursuing his duties as captain of the vessel. For example, they are liable for all torts committed by the master, in pursuance of his duties, on seamen

²⁶¹ *Disney v. Furness, Withy & Co.*, 79 Fed. 814; *The Commander-in-Chief*, 1 Wall. (U. S.) 43.

²⁶² *Drinkwater v. The Spartan*, 1 Ware (149) 145, Fed. Cas. No. 4,085; *The Packet*, 3 Mason, 255, Fed. Cas. No. 10,654; *Ex parte Clark*, 1 Spr. 69, Fed. Cas. No. 2,796.

²⁶³ *The Leonidas*, Olc. 12, Fed. Cas. No. 8,262; *The Dubuque*, 2 Abb. U. S. 20, Fed. Cas. No. 4,110; *Willard v. Dorr*, 3 Mason, 91, Fed. Cas. No. 17,679; *Revens v. Lewis*, 2 Paine, 202, Fed. Cas. No. 11,711; *The Grand Turk*, 1 Paine, 73, Fed. Cas. No. 5,683; *The Eolian*, 1 Biss. 321, Fed. Cas. No. 4,504; *Ex parte Clark*, 1 Spr. 69, Fed. Cas. No. 2,796; *Dudley v. The Superior*, 1 Newb. 176, Fed. Cas. No. 4,115; *Adams v. The Wyoming*, 2 N. J. Law J. 275, Fed. Cas. No. 71; *Bartlette v. The Viola*, 3 Chi. Leg. News, 245, Fed. Cas. No. 1,083; *Zollinger v. The Emma*, 3 Cent. Law J. 285, Fed. Cas. No. 18,218.

²⁶⁴ See the discussion of this dual character, post, § 936.

employed on the vessel, as where the master has been guilty of such ill-usage or cruel treatment that the seamen have been compelled to leave the ship. But they are not liable in damages for the willful and malicious acts of such captain in assaulting and injuring a seaman while upon the high seas. Such an act is of a criminal nature and cannot therefore be intended by the law to be within the scope of the employment of the captain, nor within the authority committed to him.²⁶⁵ "The agency of the captain for the owners would include all those acts which are fairly embraced within the scope of his appointment, and which would be in the line of his duty; but when he injures his men by misconduct or assault, that would seem to be as much one of the risks which they assumed in entering the employment upon the vessel, as it would be one in the case of an employment in a concern upon the land where the control and superintendence had been committed by the proprietor to a manager. It is impossible to regard a wanton assault upon a seaman, by his captain, as something within any intended authority, or within the scope of his employment. By no extension of the principles of the law of master and servant, the general source of the law of principal and agent, could the blame be imputed to the owners of the vessel."²⁶⁶ The master of a vessel and the crew are all engaged in a common undertaking and unless the acts of the master are in some form a violation of the obligations which the owners assume as a part of the contract of hiring, or of some positive duty imposed on them by law, they cannot be held liable therefor.²⁶⁷

If during a voyage by reason of ill-usage or cruel treatment by the master, a seaman is compelled to leave a ship, or through the master's agency the contract is broken, he is not regarded as a deserter and may recover his wages for the whole voyage.²⁶⁸ It is a matter of familiar knowledge that,

²⁶⁵ *Gabrielson v. Waydell*, 135 N. Y. 1, 31 Am. St. Rep. 791.

²⁶⁶ *Gabrielson v. Waydell*, 135 N. Y. 1, 31 Am. St. Rep. 791.

²⁶⁷ *Loughlin v. State*, 105 N. Y. 159; *Crispin v. Babbitt*, 81 N. Y. 516, 37 Am. Rep. 521.

²⁶⁸ *Rice v. The Polly & Kitty*, 2 Pet. Adm. 420, Fed. Cas. No. 11,754; *Sherwood v. McIntosh*, 1 Ware, 109, Fed. Cas. No. 12,778;

about the mariner, the maritime law throws a protection greater than is extended by the general rules of the common law to him who is employed in service upon the land. This distinction arises very naturally from the difference in the nature of a mariner's life and employment which subject him to hazards and hardships and tend to make him heedless in character. So the maritime law is peculiarly solicitous of his rights and watches over his more unprotected condition. In rendering to the seaman that care and in performing those duties towards him which the law exacts from the owners of a vessel, the captain for such purpose represents them, and a neglect of his duty in such respect is visited upon the owners.

This liability follows from the situation of the parties. The owners are not in charge of the vessel. They remain upon the land and employ a master for the vessel as well to carry out their assumed or implied obligation to the members of the ship's company as to perform the undertaking of conducting the craft successfully upon its voyage. The delegation of powers to the master of the vessel comprehends their exercise in all such ways as the speed of the vessel and welfare of its company render needful or expedient, while in those respects which demand of the owners the rendition of certain duties towards the crew, the master of the vessel must and does represent them, and by his failure and neglect will entail the consequences upon them for breach of the obligation.²⁶⁹ But as has been stated above, unless the negligent acts of the master or other officers in the navigation of the ship are such acts as involve a breach of a contract, obligation, or duties of the owners, the latter will not be responsible therefor.²⁷⁰

Limland v. Stephens, 3 Esp. 269; *Edward v. Trevellick*, 4 El. & Bl. 59; *The America*, Blatchf. & H. 185, Fed. Cas. No. 286; *Ward v. Ames*, 9 Johns. (N. Y.) 188; *Magee v. The Moss*, Gilp. 228, Fed. Cas. No. 8,944; *Relf v. The Maria*, 1 Pet. Adm. 186, Fed. Cas. No. 11,692.

²⁶⁹ *Gabrielson v. Waydell*, 135 N. Y. 1, 31 Am. St. Rep. 791.

²⁷⁰ *The City of Alexandria*, 17 Fed. 390; *Benson v. Goodwin*, 147 Mass. 237.

III. SUPERCARGO.

§ 935. Definition and nature of employment.

"Supercargoes, who are quasi factors, are persons employed by commercial companies or private merchants to take charge of cargoes they export to foreign countries to sell them there to the best advantage and to purchase proper commodities to relade the ship on their return home. For this reason supercargoes generally go out and return home with the vessel on board of which they are embarked, and thereby differ from factors who reside abroad at settlements of the public companies for whom they act."²⁷¹ From the nature of his employment he must be invested with complete control over his cargo and all that immediately concerns it.²⁷² In case of necessity he may bind his principal by a sale or pledge of part of the cargo, or otherwise, before it reaches the port of destination;²⁷³ but if he is supercargo for several shipments by the same vessel he cannot pledge them in a mass, but must keep them separate.²⁷⁴

The principles which regulate the conduct of factors abroad apply to supercargoes. They are liable for injuries to an employer occasioned by the want of reasonable skill or of ordinary diligence, by which is to be understood such skill as is, and no more than is, ordinarily possessed and employed by persons of common capacity engaged in the same employment, and by ordinary diligence that degree which persons of common prudence are accustomed to use about their own business and affairs.²⁷⁵ They are also bound to good faith and must exercise their judgment after proper inquiries and precautions, and where they have a venture on the same ship, and are bound to exercise at least as much diligence and care as to their factorage transaction

²⁷¹ 1 Beawes' Lex. Merc. 47; *The Waldo*, 2 Ware (Dav. 161) 165, Fed. Cas. No. 17,056; *Davidson v. Gwynne*, 12 East, 381; *Stone v. Waitt*, 31 Me. 409, 52 Am. Dec. 621; *Williams v. Nichols*, 13 Wend. (N. Y.) 58; *Taylor v. Wells*, 3 Watts (Pa.) 65; *McGraft v. Rugee*, 60 Wis. 406, 50 Am. Rep. 378.

²⁷² *Davidson v. Gwynne*, 12 East, 381.

²⁷³ *Forrestier v. Bordman*, 1 Story, 43, Fed. Cas. No. 4,945.

²⁷⁴ *Newbold v. Wright*, 4 Rawle (Pa.) 195.

²⁷⁵ *Galther v. Myrick*, 9 Md. 118, 66 Am. Dec. 316.

as to their own private concerns, and they are chargeable for negligence if they sell without making a proper inquiry after having received notice of facts which ought to put a person of prudence on his guard.²⁷⁶ As a general rule, they cannot delegate their authority any more than other agents, but exceptions may arise, where the power of delegation is conferred by the necessity of the case, the usages of trade, or the law and customs of the country where the agency is to be executed.²⁷⁷ Thus if, after arriving at the port of destination of the goods, he is unable to dispose of them, he is justified in leaving them there in the hands of a responsible party for sale, and such party becomes the agent of the shipper, and liable to him as such.²⁷⁸ And if, in such a case, the supercargo dies, his personal representatives are not responsible for the acts of such consignee, after his death, not imputable to instructions given during his lifetime.²⁷⁹

Where a supercargo engages to transport goods at his own risk, he is personally responsible for their loss whether by theft or otherwise.²⁸⁰ And if he makes a shipment of prohibited merchandise on the owner's account but without the latter's knowledge or consent, it is at the supercargo's risk;²⁸¹ and the acceptance by the owner of the letters and invoices sent to him by the consignees in a foreign port is not such a ratification of his acts as would throw on him the loss arising from the seizure of such prohibited articles exported by the supercargo on his account.²⁸² But if the shipper of the goods receives the proceeds thereof without

²⁷⁶ *Gaither v. Myrick*, 9 Md. 118, 66 Am. Dec. 316.

²⁷⁷ *Gaither v. Myrick*, 9 Md. 118, 66 Am. Dec. 316. See *Warner v. Martin*, 11 How. (U. S.) 209.

²⁷⁸ *Stone v. Waltt*, 31 Me. 409, 52 Am. Dec. 621; *Merrick v. Bernard*, 1 Wash. C. C. 479, Fed. Cas. No. 9,464; *Day v. Noble*, 2 Pick. (Mass.) 615; *Lawler v. Keaquick*, 1 Johns. Cas. (N. Y.) 174.

²⁷⁹ *Pawson's Adm'rs v. Donnell*, 1 Gill & J. (Md.) 1, 19 Am. Dec. 213.

²⁸⁰ *Bridge v. Austin*, 4 Mass. 115.

²⁸¹ *Pawson's Adm'rs v. Donnell*, 1 Gill & J. (Md.) 1, 19 Am. Dec. 213.

²⁸² *Pawson's Adm'rs v. Donnell*, 1 Gill & J. (Md.) 1, 19 Am. Dec. 213.

objection, he thereby ratifies the sale made by the supercargo.²⁸³

§ 936. Master of vessel as supercargo.

In the absence of any custom or usage to that effect, masters of vessels have no implied authority to act as factors or supercargoes,²⁸⁴ except in cases of urgent necessity where they may be clothed with the powers of a supercargo.²⁸⁵ He may, however, become supercargo by express authority conferred, and unite the offices of master and supercargo without combining them, as where the shipper consigns goods to the master for sale and returns.²⁸⁶ Every act that is done by him while acting in this dual capacity that is not properly and strictly in furtherance of his duty is an act for which both the master and owners may be made responsible.²⁸⁷ A master who is part owner and supercargo is liable for injury to the cargo resulting from sale of the vessel before the cargo is landed, and then landing it before a sale was effected or storage obtained in order to deliver the vessel in compliance with the contract of sale. The right to have the cargo carried and delivered according to the projected voyage is superior to the power to sell the vessel and a claim for damages for the sale of the vessel before delivery of the cargo is not affected by the fact that the shipper knew the vessel might possibly be sold.²⁸⁸

²⁸³ *Forrestier v. Bordman*, 1 Story, 43, Fed. Cas. No. 4,945.

²⁸⁴ *Taylor v. Wells*, 3 Watts (Pa.) 65; *Rapp v. Palmer*, 3 Watts (Pa.) 178.

²⁸⁵ *The Gratitude*, 3 C. Rob. Adm. 240; *The Velona*, 3 Ware, 140, Fed. Cas. No. 16,912.

²⁸⁶ *Biggs v. Lawrence*, 3 Term R. 454; *Moseley v. Lord*, 2 Conn. 389; *Stone v. Waitt*, 31 Me. 409; *Smith v. Davenport*, 34 Me. 520; *Emery v. Hersey*, 4 Me. 407; *Day v. Noble*, 2 Pick. (Mass.) 615; *United Ins. Co. v. Scott*, 1 Johns. (N. Y.) 106; *Kemp v. Coughtry*, 11 Johns. (N. Y.) 107; *Lawler v. Keaquick*, 1 Johns. Cas. (N. Y.) 174; *Williams v. Nichols*, 13 Wend. (N. Y.) 58; *Harrington v. McShane*, 2 Watts (Pa.) 443; *Smedley v. Yeaton*, 3 Cranch, C. C. 181, Fed. Cas. No. 12,965; *Parsons*, Mar. Law, 463.

²⁸⁷ *Gaither v. Myrick*, 9 Md. 118, 66 Am. Dec. 316.

²⁸⁸ *Gaither v. Myrick*, 9 Md. 118, 66 Am. Dec. 316.

— **Rights and duties in dual capacity.** In such a case, he does not act as master in disposing of the goods, but deals with them in his character of supercargo or factor. His duties and liabilities under these two characters are as distinct and independent as they would be if the trusts were confided to different persons. In all that relates to transportation of the goods, and the navigation of the ship he acts as master, and all that he does in relation to the disposition of the merchandise is referred to his character as factor. In these characters, he is the agent of different principals; in the first he is the agent of the shipowners, and his acts are imputable to them; in the second, he is a stranger to them, and they are no more responsible for his acts than they would be for those of a third person, to whom the shipper should consign his goods. In the transaction of that business he is the agent of the shipper.²⁸⁹ After the arrival of the ship at the port of destination, he delivers the cargo as master and receives it as consignee, all his duties as master are then discharged, and in disposing of the goods at such port he acts as agent of the consignor.²⁹⁰ A master of a vessel who thus acts in the capacity of a supercargo with knowledge of the shipper cannot wholly abandon his duty in the former capacity to discharge that of the latter; but he must act in both as far as possible with reference to the respective interests of his principal in each capacity.²⁹¹ A supercargo who abandons his trust or delegates his agency merely because the cargo could not be disposed of at one of the ports reached prior to the port of destination is guilty

²⁸⁹ *The Waldo*, 2 Ware (Dav. 161) 165, Fed. Cas. No. 17,056; *The Maiden City*, 33 Fed. 715; *The St. Nicholas*, 1 Wheat. (U. S.) 417; *Earle v. Rowcroft*, 8 East, 126; *Stone v. Waitt*, 31 Me. 409, 52 Am. Dec. 621; *Gaither v. Myrick*, 9 Md. 118, 66 Am. Dec. 316; *Williams v. Nichols*, 13 Wend. (N. Y.) 58; *Cook v. Commercial Ins. Co.*, 11 Johns. (N. Y.) 40; *Taylor v. Wells*, 3 Watts (Pa.) 65; *Dusar v. Perit*, 4 Bin. (Pa.) 361. See *The New Hampshire*, 21 Fed. 924; *The Flash*, Abb. Adm. 67, Fed. Cas. No. 4,857.

²⁹⁰ *Stone v. Waitt*, 31 Me. 409, 52 Am. Dec. 621.

²⁹¹ *Gaither v. Myrick*, 9 Md. 118, 66 Am. Dec. 316; *Day v. Noble*, 2 Pick. (Mass.) 615.

of a violation of duty and liable therefor.²⁹² But he is not liable for damages because another party wrongfully and without his consent assumes authority to sell and does sell the cargo.²⁹³

§ 937. Rights of supercargo against principal.

A supercargo like all other agents has a right to be compensated by his principal for services rendered by him as such, and for any general balance due to him by the owners, he may retain goods in his possession.²⁹⁴ And a misconduct of the supercargo producing neither injury nor inconvenience to the owner is no defense to the action for the payment of wages.²⁹⁵ But the owner of the ship and cargo, where he is the owner of both, has the uncontrolled power of breaking up or changing the voyage. The effect of the exercise of this power, upon the contract between the owner and the master or supercargo, depends upon the circumstances of the case and must be governed by these principles in the absence of all commercial usage upon the subject. If by the exercise of this important privilege, a special injury is done to the master or supercargo, the ship owner must bear the loss. He must make a reasonable indemnity. If on the contrary by the change of voyage, the master or supercargo be necessarily discharged from the performance of all the duties for which a remuneration has been stipulated, his claim to such remuneration is thereby extinguished. If a part of the duties has been executed, then such a proportion of the stipulated compensation should be allowed as appears just, on comparing the services rendered under the voyage originally contemplated with those which remain unperformed.²⁹⁶

²⁹² *Gaither v. Myrick*, 9 Md. 118, 66 Am. Dec. 316.

²⁹³ *Gaither v. Myrick*, 9 Md. 118, 66 Am. Dec. 316.

²⁹⁴ *Luckett v. West*, 4 Cranch, C. C. 101, Fed. Cas. No. 8,598; *Vowell v. West*, 4 Cranch, C. C. 100, Fed. Cas. No. 17,024.

²⁹⁵ *Pawson's Adm'rs v. Donnell*, 1 Gill & J. (Md.) 1, 19 Am. Dec. 213.

²⁹⁶ *Pawson's Adm'rs v. Donnell*, 1 Gill & J. (Md.) 1, 19 Am. Dec. 213.

IV. SHIP'S HUSBAND.

§ 938. Definition and nature of employment.

A ship's husband, in maritime law, is an agent appointed by the owner of a ship, and invested with authority to make the requisite repairs, and attend to the management, equipment, and other concerns of the ship.²⁹⁷ He is usually a part owner of the vessel over which his agency extends, but not necessarily so. When he is a stranger he is properly the ship's husband. And the fact that he is a part owner of the vessel confers no greater or different authority on him as ship's husband than he would otherwise possess. He is the general agent of the owners of the vessel with respect to her management, which agency may be constituted by writing or orally, or it may be implied from his conduct with the knowledge and acquiescence of the owner.²⁹⁸ He cannot delegate his authority.²⁹⁹

§ 939. Powers.

The powers of a ship's husband are determined mainly by usage and are in general to provide for the complete seaworthiness of the ship; to see that she has on board all necessary and proper papers; to make contracts for freight and to collect the freight and to enter into proper charter parties; to direct the repairs, appoint the officers and mariners; to see that the vessel is furnished with provisions and stores, and generally to conduct all the affairs and arrangements for the due employment of the ship in commerce and navigation, and for all these purposes he is the agent of the owners, and can bind them by his contracts.³⁰⁰

²⁹⁷ See Cyc. Law. Dict. 848.

²⁹⁸ *Revens v. Lewis*, 2 Paine, 202, Fed. Cas. No. 11,711; *Parsons. Mar. Law*, 97; *McCready v. Thorn*, 51 N. Y. 454. He must disclose his agency in some unmistakable manner to persons with whom he deals, otherwise he may be chargeable as principal. *Kerry v. Pacific Marine Co.*, 121 Cal. 564.

²⁹⁹ Not even to the master. *Kimball v. The Dispatch*, 5 West. Law Month. 209, Fed. Cas. No. 7,773.

³⁰⁰ *McCready v. Thorn*, 51 N. Y. 457; *Chase v. McLean*, 130 N. Y. 534; 1 *Parsons, Mar. Law*, 98.

But unless specially authorized, he has no power to contract loans on behalf of his principal,³⁰¹ especially not, when it appeared that the loan was made when the vessel was out of commission, and the money was borrowed and used in paying a debt previously incurred.³⁰²

The power of a ship's husband, as such, and in the absence of any special authority, to bind the owners of the ship by his contracts, relates only to the present or future of the ship; it is based on present and pressing necessity.³⁰³ But this doctrine has been modified in some cases, so as to authorize the borrowing of money in foreign ports in case of necessity, and afterwards so as to include home ports, if the owner could not be communicated with, and the money was required immediately and for a specific purpose.³⁰⁴ And it has even, so far, been extended as to permit the borrowing of money to pay for such supplies as the ship's husband would have authority to purchase on credit.³⁰⁵

Nor has he, in the absence of special authority, power to take out insurance on the vessel;³⁰⁶ nor to waive liens for freight;³⁰⁷ nor to purchase a cargo on behalf of the owners,³⁰⁸ though he may purchase an outfit for a vessel to enable it to carry on business.³⁰⁹ It has been said that he cannot bring action so as to charge the owner with the

³⁰¹ *Harris v. Reynolds*, 4 Wkly. Rep. 278; *The Ole Oleson*, 20 Fed. 384; *Arey v. Hall*, 81 Me. 17, 10 Am. St. Rep. 232.

³⁰² *Chase v. McLean*, 130 N. Y. 529.

³⁰³ *Chase v. McLean*, 130 N. Y. 529.

³⁰⁴ *Chase v. McLean*, 130 N. Y. 535; *Rocher v. Busher*, 1 Starkie, 27; *Palmer v. Gooch*, 2 Starkie, 428; *Stearns v. Doe*, 12 Gray (Mass.) 482.

³⁰⁵ *McCready v. Thorn*, 51 N. Y. 454.

³⁰⁶ *French v. Backhouse*, 5 Burrow, 2727; *Hooper v. Lusby*, 4 Camp. 66; *Bell v. Humphries*, 2 Starkie, 345; *The Ole Oleson*, 20 Fed. 384.

³⁰⁷ *Hewett v. Buck*, 17 Me. 147; *Foster v. United States Ins. Co.*, 11 Pick. (Mass.) 85; *Finney v. Warren Ins. Co.*, 1 Metc. (Mass.) 16.

³⁰⁸ *Robinson v. Gleadow*, 2 Bing. N. C. 156; *The Ole Oleson*, 20 Fed. 384; *Patterson v. Chalmers*, 7 B. Mon. (Ky.) 595; *Foster v. United States Ins. Co.*, 11 Pick. (Mass.) 85; *Turner v. Burrows*, 5 Wend. (N. Y.) 541, 8 Wend. 144.

³⁰⁹ *Hall v. Thing*, 23 Me. 461.

expenses thereof,³¹⁰ but the correctness of this statement is doubted.³¹¹ He may, however, procure bail, on behalf of his co-owners, to release the vessel from attachment on a debt or liability for which all the owners are liable,³¹² though not where the attachment is in a home port and the other co-owners are not personally liable for the debt.³¹³

As has been stated above, one of the principal objects for which a ship's husband is appointed, is to make the necessary repairs, and attend to the management and equipment of the vessel. From this it follows, as a general rule, that he may bind the owners, or his co-owners, by the purchase of necessary supplies, and by ordering necessary repairs to be made.³¹⁴ In some of the cases, however, it is held that this rule applies only to supplies or repairs necessary in a foreign port; and that a ship's husband cannot bind his co-owners for supplies purchased or repairs ordered in a home port.³¹⁵

§ 940. Duties.

His principal duties are the same as his powers: To furnish the vessel with a proper outfit, to see that she is in a seaworthy condition, and is supplied with the necessary papers, to care for her in port, to enter into charter parties, to contract for freights, to collect the same, to adjust averages, and to account to the owners.³¹⁶

³¹⁰ *Campbell v. Stein*, 6 Dow, 116, 135.

³¹¹ See *Parsons*, Mar. Law, 99.

³¹² *Barker v. Highley*, 15 C. B. (N. S.) 27.

³¹³ *Mitchell v. Chambers*, 43 Mich. 150, 38 Am. Rep. 167.

³¹⁴ *Whitwell v. Perrin*, 4 C. B. (N. S.) 412; *Tolson v. Hallett*, 1 Amb. 269; *Frazer v. Cuthbertson*, 50 Law J. Q. B. 277; *Bell v. Humphries*, 2 Starkie, 345; *Hall v. Thing*, 23 Me. 461; *Schemerhorn v. Loines*, 7 Johns. (N. Y.) 311.

³¹⁵ *Hill v. Crocker*, 87 Me. 208, 47 Am. St. Rep. 321; *Benson v. Thompson*, 27 Me. 470. But see *Atkins v. Lewis*, 168 Mass. 534.

³¹⁶ *Darby v. Baines*, 9 Hare, 369; *Sims v. Brittain*, 4 Barn. & Adol. 375; *Smith v. Lay*, 3 Kay & J. 105; *Owston v. Ogle*, 13 East, 538; *Benson v. Heathorn*, 1 Young & C. 326; *Parsons*, Mar. Law, 97; *Gould v. Stanton*, 16 Conn. 12; *Turner v. Burrows*, 8 Wend. (N. Y.) 144.

§ 941. Remedies—Against owners.

If he is a part owner of the vessel, each owner is liable to contribute to him for his share of the general charges or indebtedness incurred for the ship. If he is not a part owner, all the owners are responsible to him in solido.³¹⁷ But if a creditor should trust him solely, or deal with him in such a way as to lead the owners to believe that the dealing was on his personal credit, and to settle with him in that belief, they are not responsible.³¹⁸

— **Against vessel—Lien.** A ship's husband, as such, does not seem to be entitled to a lien on the vessel for his charges, disbursements, or obligations incurred.³¹⁹ He may have a lien, however, on the proceeds of a voyage, or of the vessel, provided he has obtained possession thereof. If he is a part owner he has a lien in that character.³²⁰

³¹⁷ *Helme v. Smith*, 7 Bing. 709. And see *Brown v. Tapscott*, 6 Mees. & W. 119.

³¹⁸ *Thompson v. Finden*, 4 Car. & P. 158; *Reed v. White*, 5 Esp. 122; *Muldon v. Whitlock*, 1 Cow. (N. Y.) 290. And see *Wyatt v. Hartford*, 3 East, 147; *Cheever v. Smith*, 15 Johns. (N. Y.) 276.

³¹⁹ *Ex parte Young*, 2 Ves. & B. 242; *Holderness v. Shackels*, 8 Barn. & C. 612; *Smith v. De Silva*, Cowp. 469; *The Larch*, 2 Curt. 427, Fed. Cas. No. 8,085; *Macy v. De Wolf*, 3 Woodb. & M. 193, 210, Fed. Cas. No. 8,933; *Gould v. Stanton*, 16 Conn. 12; *Mumford v. Nicoll*, 20 Johns. (N. Y.) 611.

³²⁰ If he is a part owner, he has no lien for advances for outfitting made for another owner, though he has a right of action therefor. *Helme v. Smith*, 7 Bing. 709.

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